United States Court of Appeals

for the Second Circuit

APPENDIX

76-6189

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

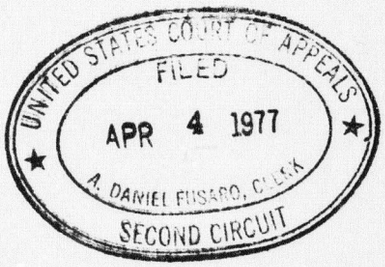
Plaintiff-Appellant,

v.

BAUSCH & LOMB INCORPORATED and
DANIEL G. SCHUMAN

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of New York



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only appointments those two days she had made for me with anybody. You said analysts but any appointments.

Q Had she cleared making those appointments with you while you were in Mexico?

A No.

Q Did you give consideration to whether you should keep or cancel those appointments?

A Yes. She told me that she did it -- this is a very unusual practice -- I didn't want her to make appointments for me even on a tentative basis and she said that she felt a lot of pressure from these gentlemen and did it on a tentative basis and left it that she would confirm with them those days after I returned.

Then I guess part of your question is did I confirm?

Q Yes, did you decide to go forward with the interviews and if so why?

A I decided to go forward with them. I debated -- I didn't like the idea of having any interviews that week because --

MR. GREENSPOON: He already answered the question.

Q Why did you decide to see them?

A Several reasons. I was concerned with what was happening to the stock and all the flak again, and what the impression would be in Wall Street if I were to cancel those appointments.

I felt that it would be misinterpreted, this would just compound the problem that we were ducking them and I didn't feel that it would look right to do that.

I also on Monday knew about the Dorfman call to Mr. Harby and I think before she can confirmed those dates, I had already talked to Dorfman about the date to meet with him and I was very interested really in hearing what these fellows were saying about what was going on and what their thinking was, what the attitude was. I felt that would help me better in coping with the Dorfman meeting.

So I had that kind of dual concern about keeping those dates and I let them stand. She confirmed them.

Q I am going to turn now to the interview with Mr. Sanders in the afternoon of the 15th of March.

MR. LIMAN: I do this, your Honor, even

though the Government does not make any claims that the information there was material.

Q Mr. Schuman, do you recall discussing with Mr. Sanders the effect that the flak was having upon the sales of your product?

A Yes.

Q What was said on that subject?

A We were talking about the magnitude of it, the intensity and I again went through the routine that I did with each of these fellows of how we looked at it, that we had to convince the practitioners, we couldn't do anything with the public directly.

And the subject came up, well, how are sales doing and I said they look to us as in connection with the trend line based on the warranty cards we got back, was not increasing, it was flattening out and I also pointed out that we were always a little concerned with drawing any conclusions from those warranty cards because the information from week to week could be highly erratic.

We felt it would be more meaningful over a longer period and that the information or any conclusions based on a couple of weeks, in my judg-

ment, was not significant and could be very misleading.

Q Did you say to him in substance that you could no longer make the statement that sales were increasing week by week?

A Yes.

Q Did you discuss with Mr. Sanders the aphakics?

A Yes.

Q What did he ask you and what did you say?

A He simply asked me when I thought I would be getting them out and I simply again responded as I was saying earlier, yesterday I guess, that we expected to get them out somewhere around the end of April or May.

But this is something that I am sure I did not convey there was any certainty about that.

Q Did he express any disappointment to you that they weren't coming out until then?

A No.

Q Did you discuss with Mr. Sanders the introduction of a minikit for practitioners?

A Yes.

Q What did you say to him?

A He asked me when we would start those shipments. The minikit had been announced to the professionals I think somewhere around the beginning of the month when the price lists were issued and these fellows were very well aware of these things. I think as soon as we sent anything to a doctor I suspect that they received it.

Q Did he express --

MR. GREENSPOON: I move to strike that.

THE COURT: Strike it.

Q Did he express any disappointment to you that the small practitioner's kit wasn't getting out in time?

MR. GREENSPOON: Objection to that.

THE COURT: Sustained.

Q Did he say anything to you about the fact that the kit wasn't getting out until the end of the quarter?

A No, sir.

Q Did you say anything in this conversation with Mr. Sanders that you were not prepared to say to any other analyst or stockholder who asked you a question?

A I said --

MR. GREENSPOON: Objection to that.

THE COURT: Sustained.

Q Was there anything said in this conversation which led you to believe there would be any market reaction to what you were discussing with Sanders?

MR. GREENSPOON: Objection.

THE COURT: Just yes or no.

THE WITNESS: May I hear the question?

THE COURT: Read the question, Mr. Reporter.

(Question read.)

A Nothing was said, no.

Q Was there anything said in this conversation which you believed to be important and new and undisclosed?

A Nothing.

Q Now, let us turn to Messrs. --did Mr. Sanders tell you what he was estimating for your earnings?

A Yes.

Q What figures did he use, if you recall?

A He threw the number of $5 for the year and 75 cents for the first quarter and asked me

what I thought about those numbers.

Q What did you say?

A I would not comment on the numbers and knew better than that

Q You then saw Wien and Clancy, am I correct?

A Yes.

THE COURT: As I recall your testimony, the two conferences followed one upon the other? As I recall from yesterday you said something to the effect as Sanders was leaving he met Mr. Clancy and Wien who were waiting?

THE WITNESS: Yes.

THE COURT: Th two conferences followed almost immediately one after the other?

THE WITNESS: That is correct. As one in a sense was going out my secretary was bringing the other two in and they crossed each other and apparently said hello.

Q I want the Court to hear from you what was said in this conversation with Wien and Clancy about the Sanders estimate?

A They talked about Sanders and in a way that indicated to me that they knew him. And they

asked -- I don't know whether this was the first word or what but what I remember of it, very early, as part of that conversation about Sanders just leaving, what was Sanders forecasting for the year, and I told them he just told me that he was looking for $5.

Q Did you comment that this figure was in the ball park or out of the ball park or anything like that?

A No.

Q Did you address any remark to this specific comment?

A Not directly to that comment.

Q What did you say?

A I then talked generally about what analysts were estimating. It may be in response to their question or not, I don't recall. But I indicated that there was a very wide range and I understood that, because in my opinion, we had no idea ourselves what Soflens was going to be doing.

THE COURT: Did you say that?

THE WITNESS: Yes.

A (Continuing) Even though I might add, your Honor, we had budgeted that, that didn't mean

anything because it was a new product, there had been no prior experience. Everything about it just made it extremely difficult to come up with any kind of numbers that you could feel any confidence in.

So I said that there was quite a range and I think I may have indicated what I thought the range was because I had been seeing what analysts were saying or in their written reports from time to time. I am sure I didn't see it all by any means but I had a recollection at that time, as I do now, that the range was somewhere between four and eight or $10 a share for the year.

I indicated that I was not happy with the tremendous interest of Wall Street in the stock. That I felt this was hurting us, putting a lot of pressure on us and maybe this is why the Wall Street Journal, I was speculating this way with them, the Wall Street Journal picked up all their interest and led up into the whole contamination bit.

It is ironic but the stock price, that may be in my mind, more than most things, got us into the contamination bit with the Wall Street Journal and we were not interested in seeing the

stock run away.

Our job was to get the lens into the marketplace and to convince the practitioners that it was a good product and the public it was a good product and what happened in Wall Street would take care of itself, in my opinion, based on facts and not based on conjecture or anticipation.

I wished they didn't put, had not been putting us under such intense pressure and that I wished they would be far more conservative in their approach to the whole thing but it was beyond our control.

We didn't feel that we could put anything out that would curb this because we just didn't know and maybe Wall Street was right, maybe they were wrong. Whatever we did we felt could be interpreted as being wrong with hindsight so we just didn't feel we could respond to that situation from a market view.

MR. GREENSPOON: Did I understand that to be the substance of what he said to Mr. Wien and Mr. Clancy?

THE WITNESS: Yes, sir.

Q What if anything was said about the

effect that the flak was having on your sales?

A Well, a great deal because this was the whole thrust of their visit and my feeling from --

Q What did you say and what did they say, not your feelings?

A They were telling me that the flak was hurting us greatly, were we aware of how much we were being hurt by the misunderstanding and confusion and what I described as flak.

Q You said hurt. Did they say hurt on Wall Street or sales of the product?

A Sales. And they were saying that what we had to do, and this was presented in a rather aggressive way, we had to get a strong public relations program going out to the market and promote the product to the public and that if we didn't do that we were going to be in even more trouble than we were then.

I tried to convey to them that I didn't share their view as to how dire the situation was and I explained to them that we could not, in our view, market the product the way they were suggesting it and that we viewed the thing from the standpoint of convincing the practitioners that we had to get data

out, and get more experience out, get technical articles written by the professionals who have worked with the lens so they could communicate it to their peers and that this would all emerge.

If the product was any good, that would be the real test and not what the view of whether people thought there might be contamination or people thought that we would be hurt by a lack of immediate product promotion.

Q Mr. Schuman, did you say anything more to them about the impact that the flak was having on your sales and you said to Sanders?

A I did not.

MR. GREENSPOON: Objection.

THE COURT: Sustained.

Q What did you say to them about weekly sales, if anything?

A I explained the whole business of the warranty cards just as I explained before and I went through the same routine.

Q Tell us?

A With them. About the warranty cards and the sales line flattening out but this was only a couple of weeks and I didn't attach any signifi-

cance to that.

And I add something else that just occurred to me and the point of all this is, I guess something as to state of mind --

MR. GREENSPOON: I object to these remarks, your Honor. I think this is unresponsive.

THE COURT: Strike that remark and I will ask Mr. Liman to put his next question.

Q Now, you testified on your direct examination that something was said with them about $3 a share as an estimate. Do you recall that?

A Yes.

Q What did they say and what did you say in response if you recall?

A First of all, the mention of the $3 was in no way related to the $5. These discussions --

Q Did it come up in the same part of the conversation?

A No, it did not come up in the same part of the discussion. The $3 came up in the conversation where we were talking about the flak and the effect on sales and they threw out a number of like your earnings may be down to $3 or some way of saying

it that way. It wasn't like would they be that, like telling me it was going to be like that and I thought they were being a little aggressive in saying it that way and if I recall I said something sarcastic back like "Why don't you say $1" or something of that kind and that was the end of it.

Q Did they ask you about the aphakics and the small practitioners' kits?

A Yes. I think we got into that briefly but I am a little fuzzy now.

Q In any event, if you are fuzzy, do you recall whether any of these conversations with Mr. Wien or Clancy and then with MacCallum, you said anything more on the subject of aphakics than you told Sanders?

MR. GREENSPOON: Objection, he already indicated he was fuzzy and doesn't recollect it.

THE COURT: Well, if he can refresh the witness' recollection I will listen. But if you covered the matter to the best of your recollection as refreshed, we will let it stand.

Q Mr. Schuman, did you attach any importance to the question of whether the aphakics would be coming out in April rather than March?

A I did not.

Q The same is true of the date for the introduction of the small kit?

A That is correct.

Q Why is that?

A The introduction of any product is an uncertain thing and the important thing is that it does get out and it is well received. And whether it gets out one day sooner or one week sooner or one month sooner is a very difficult thing to predict and in the end you are going to get those sales anyway.

Q Did you tell them those products were going to be coming out?

A I believe I did.

Q Was there some news broadcast on the wire that day relating to Soflens and your product? This is the 15th.

A Yes.

Q What was that news, sir?

A The announcement of a negotiation, I think a joint announcement Warner-Lambert, which was the parent of the American Optical Company, the largest company in our industry and another

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company called Frigitronics which had perhaps a year or two earlier acquired the rights from another company for a lens called the Griffin lens --

MR. GREENSPOON: Objection and move to strike unless it is shown that he knew about it on that day.

Q Did that news come to your attention and when?

A As I recall --

MR. LIMAN: Do I understand from that objection that the SEC is excluding from its case the events of the 16th? Because then I will withdraw the question.

THE COURT: I don't find that to be anything close to what Mr. Greenspoon has indicated. I think that though counsel would love to jump on this particular opportunity, I don't think it is made available to him.

Let us find out, however, whether this is the fact. You indicated that you were aware of a joint announcement made on March 15 regarding the negotiations between Warner-Lambert and Frigitronics?

THE WITNESS: Regarding another soft lens.

THE COURT: When for the first time did you learn of that joint announcement?

THE WITNESS: As I recall I received a telephone call, and I don't know that I can tell you from whom now, that late that afternoon, telling me that such an announcement had been released.

THE COURT: When you say late that afternoon you have reference to the afternoon of March 15?

THE WITNESS: Wednesday, March 15, your Honor.

Q What was the position of Warner-Lambert in the optics industry?

MR. GREENSPOON: At what time and what is the relevance?

MR. LIMAN: The impact of this announcement --

THE COURT: I will take notice of the fact that Warner-Lambert is a large well-financed company at that time.

MR. LIMAN: The No. 1 company in this industry.

THE COURT: I didn't know that.

Tell me as to Warner-Lambert, what type of company it was, the position it occupied in the industry of March of 1972?

THE WITNESS: Warner-Lambert was a very much larger company than Bausch & Lomb and deeply entrenched in pharmaceuticals and consumer products and had marketing strength and pretty good research and development strength.

They had acquired and I am a little fuzzy on this date, but not very long before the 1972 period we are talking about, the largest company in the industry, American Optical Company and American Optical Company had, we understood, made an effort on its own before it had been acquired by Warner-Lambert to get into some kind of program with hydrophilics, soft contact lenses.

We were very concerned with this announcement at that point in terms of what it meant.

Q Did you also get news that day that there was an announcement that the small business committee of the Senate was conducting an investigation of your monopoly in the Soflens business?

MR. GREENSPOON: I have to object.

He is simply leading him.

MR. LIMAN: I want to move it along. This is something stipulated to.

THE COURT: I don't know that I have to be told from the mouth of the witness if it is stipulated.

MR. LIMAN: I just want to move this along.

THE COURT: Let me ask a broadside question of the witness:

Going back to March 15, 1972 will you tell us what if any more information had come to your attention regarding developments either in the Soflens field or affecting your company? You mentioned an announcement of the negotiations between Warner-Lambert and Frigitronics. What else?

THE WITNESS: I received a call from Reuters news reporter, I recall his name as being Dobson, asking me about a possible Senate investigation of what he referred to as I recall it Bausch & Lomb's monopolistic position and that really shocked me.

THE COURT: This was the first you heard

of such a thing?

THE WITNESS: Yes. In the next day or two several other people called me and told me about it.

MR. GREENSPOON: I move to strike that part.

THE COURT: Yes, it is not responsive. I will let it stand.

You received a call from a man at Reuters inquiring as to a possible Senate investigation of your company's practices in the area of antitrust?

THE WITNESS: No, the way he said it was-- no, sir, this is quite different.

THE COURT: Please tell me?

THE WITNESS: A possible Senate investigation about the apparent monopolistic position of Bausch & Lomb in the soft contact lens field. I can explain that if your Honor wishes.

THE COURT: No, that is sufficient.

A Another bit of news that was of considerable concern to me was I received on Wednesday morning in a telephone conversation with our account representative, whatever that may mean, I think a vice-president of Goldman Sachs -- but

this was not the purpose of the conversation at all -- but in the course of the conversation he told me that there was a block of stock of 100,000 shares that, as he phrased it, was overhanging the market.

MR. LIMAN: Your Honor, I will direct your attention to stipulations 49 and 50 which cover the rumors about the Senate investigation and the Warner-Lambert entry into the industry.

THE COURT: Do you have anything on this block of stock overhanging the market?

MR. LIMAN: No, but that will come out shortly, your Honor.

THE COURT: What was the name of the gentleman at Goldman Sachs?

THE WITNESS: Mr. Don Miller.

Q Mr. Schuman, getting back to Wien and Clancy, did you give them any earnings estimates?

A No, sir.

THE COURT: Other than your sarcastic remark, "Why don't you say a dollar", is that correct?

THE WITNESS: No, I don't recall that I said that, your Honor. I said it was something

sarcastic like that. I don't recall what it was.

Q But it was a sarcastic remark?

A Yes. I am trying to give you some of the flavor of it but I don't recall that I said that.

THE COURT: I had it down in my mind and if I am in error the record will speak for itself.

MR. LIMAN: He used the word "like".

THE WITNESS: Maybe I am trying to be too graphic or say too much. I am trying to give you some of the flavor. I don't recall that I said that.

Q Did he ask you what you were going to earn?

A No.

Q Now, was there discussion with them about the rate of fitting by the fitting practitioners?

A Yes.

Q What did they say and what did you say?

A Somewhere in the conversation they asked me what I thought or were practitioners fitting at the rate of one pair of lenses per week.

Q What did you say?

A I said I would not respond to that question but I didn't want to comment on it and I told them that it was a very difficult number to come by and

they must know that practitioners vary greatly in number of lenses that they use and this was a kind of number that would require an awful lot of data to support.

(Continued on next page.)

Q Did you give him any such data?

A No, sir.

Q Did they ask you how many fitting practitioners Bausch & Lomb had?

A No, sir.

Q Was that information confidential within the company?

A Yes.

Q Now, did Mr. Clancy say to you at any time during this interview that he planned to recommend that his company sell some of the shares but hold most of them?

A No, sir.

Q Did Mr. Wien say to you that he planned to recommend that his company sell all of its shares?

A No, sir.

Q Did Mr. Sanders in his interview say to you that he planned to buy shares?

A No, sir.

Q Did you have any knowledge that any of them intended to buy or sell or trade stock after the interviews with you?

A None whatsoever.

Q Now let's get to the morning --

Q Were you aware, at the time of your interviews with the Messrs. Sanders, Wien and Clancy, that they or the firms with which they were associated had any position in Bausch & Lomb stock?

A No, sir. If I may amplify it again -- I am getting gun shy now, your Honor. May I?

Q Yes, if you wish to.

A Well, I just assumed that they dealt with other investors, that they were research people trying to, you know, get business, to provide a professional service.

Q From time to time in 1972, particularly up to March 16th, did you have occasion to examine the records of stock transfers of your company to find out where the stock was, who was buying it and who was selling it?

A The company did this sometime, in my recollection, early in the '60s and I think there was one other time when this was done. But I can't pinpoint the second time. It could have been after all these events. It could have been before.

Wait a minute. You are asking and, you know, my mind is going.

It had something to do with Kellam,

because Kellam was involved in the second one. I think. And Kellam came with us -- okay. I have got it pinpointed.

Kellam died in January of 1972, and during Kellam's period he was involved with this kind of effort.

But I might also add that so much of the stock [redacted] nominees' names that it is very difficult to really know who owns stock. It is a very difficult thing. And so much was in brokers' names --

MR. GREENSPOON: I am going to object and move to strike that on the grounds that he has indicated that "Only at one time in the '60s." There is no evidence to show that he knew it was in nominee names or street names or whatever.

THE COURT: I will strike it.

MR. LIMAN: The Court can almost take judicial notice of that. If anybody ever looks at the transfer lists, it is in [redacted]ede. That is the Stock Exchange Company.

MR. GREENSPOON: That is my very point.

THE COURT: I wanted to see if the witness had an awareness of where the stock in his company was placed. He indicated to me that he did not take

personal note of this, that if anybody did it was another gentleman who died in January 1972.

If I am in error on this, you might want to correct me.

THE WITNESS: Yes. I was trying to pinpoint the second, because I used the other -- I was involved myself with both. I was more involved with the first one because I kind of set up how we did it, and actually the treasurer and myself sorted everything in piles. We set code numbers, and I used that as a guideline to show Mr. Kellam also how to do it, and I went through a lot of this myself with him.

THE COURT: I think this might be a good time for us to take our mid-morning recess, if it is convenient to counsel. The minutes.

(Recess.)

THE COURT: You may proceed, Mr. Liman.

BY MR. LIMAN:

Q You met with Mr. MacCallum that morning, am I correct --

A Yes, sir.

Q -- of the 16th?

A Yes, sir.

Q Yesterday, on your direct examination, you testified that you said in substance to MacCallum during the course of this interview that Bausch & Lomb was replanning its year and trying to work up numbers.

Do you remember that?

A I remember a question was asked that way, yes, sir.

Q And what did you mean by your answer, that you were planning your year and trying to work up numbers?

A We as a regular routine thing, after we have the budget, as the year goes on, each quarter obtain a forecast, developed by the joint effort of our financial people and the operating people, which would provide us with a set of financial statements, that we refer to as forecasts, which would include what has already happened during the year and what we think will happen for the balance of the year.

And that forecast is prepared after the end of each quarter -- actually some of the work starts before the end of the quarter, but it isn't completed until after the numbers are in for the quarter -- and shows the succeeding quarter by month

and each of the remaining quarters by quarter, and of course includes a number that includes for the earlier period so we have a figure for the year as a whole.

Q This is routine budgeting practice?

A Yes, it is.

Q And do you know whether it is observed by other companies?

A Yes, I do.

MR. GREENSPOON: Objection to that.

THE COURT: Well, he was with Stromberg Carlson and I assume he has some experience by virtue of the fact that he meets with other people in industry.

MR. LIMAN: He was also a consultant with Price, Waterhouse, he told you.

Q Is this a normal budgetary process?

A Yes, sir.

Q Did you tell MacCallum that you were revising your forecast upward or downward?

A I did not tell him anything like that, either way.

THE COURT: This forecast to which you have just made reference, this was an internal corporate matter?

THE WITNESS: Yes, indeed.

THE COURT: It is not filed in any public place with the SEC or with any stock exchange, is that correct?

THE WITNESS: No, sir.

BY MR. LIMAN:

Q In this morning interview with MacCallum, did you tell him what the numbers that forecast revealed for Soflens?

A No.

Q Did you tell him what your quarterly earnings were as forecast?

A Let me point out also that --

Q Can you answer that question first, please, whether you told him what your forecast showed your earnings to be?

A No.

Q Okay. Now, is there something that I didn't ask you that you want to point out?

A No

Q This case has been a long time in the making and I know there is a lot that you want to get off your chest, but I want to move the case along, Mr. Schuman.

Can you tell me what you said, if anything, about the impact of the flak on your sales?

THE COURT: I would like to go back to your last question. I would like to first find out whether you said anything at all to MacCallum about quarterly earnings. You said you didn't give him numbers. But did you have any conversation with him at all on the subject of quarterly earnings? And then we will go next to the question --

THE WITNESS: Not at all.

Q Did you have any conversation with MacCallum at all about the effect of the flak on your sales?

A Yes.

Q And what was said there?

A Well, we talked about the flak, and in response to a question on what was happening, I pointed out that the trend line of sales seemed to be flattening out, that the last three weeks were not showing the kind of increases that we had had before, and this, I explained, in my mind did not have any significance, that you couldn't draw any conclusions from a couple of weeks.

I explained that there were some

questions in our mind about the data that comes in based on the warranty cards being indicative of what was happening on a weekly basis because of the uncertainty of the flow of those warranty cards.

I also indicated that there were some questions in our mind about seasonality problems, that we hadn't any real experience with Soflens and that we did not have very much experience with hard contact lenses, that we understood that there were seasonal factors with hard contacts.

And I also mentioned the fact that the suspension of the shipments because of the vial problem could have had some impact on the flow of the warranty cards because, again, of the effect it would have on the state of mind of the practitioners and the potential patients.

THE COURT: Let me stay with that and see if I can get some significance out of this, because I have very little at this point in this area.

Who brought up the subject of sales?

THE WITNESS: Mr. MacCallum.

THE COURT: What, if anything, did he say, in words or substance?

THE WITNESS: He asked me how sales

were doing.

THE COURT: What, if anything, did you say?

THE WITNESS: Just what I got through saying, your Honor, about sales flattening out.

THE COURT: But then you say you went on to say, "They appear to be flattening out; however, that has no particular significance because what I have given you is over a relatively short range."

Is that what you said to him?

THE WITNESS: Yes, sir.

THE COURT: All right. Go ahead. What else did you say?

THE WITNESS: Well, there was conversation about the flak.

THE COURT: Just tell me what was said.

THE WITNESS: Well, that this was -- it is hard for me to distinguish, in a sense, between what he was saying and what I was saying at that point, because they were telling me about the flak and I was acknowledging it and agreeing with them and I was saying, "Yes, it is hurting us," and we were concerned about it.

And I described that it wasn't fair,

and a lot of things.

But I also indicated, and this I am sure I did with MacCallum as I did with others, that all of this will pass, these were short term problems, in my judgment, and that the product was a good product and that as time went on the facts, the evidence, the acceptance would make that totally evident.

THE COURT: Did you indicate to him that any event would cause this to pass, other than the passage of time?

THE WITNESS: No, sir. By "event" -- there is no one event, in my opinion, that could do that, and I didn't talk in terms of an event in any way.

THE COURT: Or series of events?

THE WITNESS: No, sir.

THE COURT: You just said that this would pass with time because the product is a good product.

THE WITNESS: Yes, sir.

THE COURT: All right.

Was there anything else said on the subject of sales, either by Mr. MacCallum or by you?

THE WITNESS: There was some conversation about opthalmic sales, scientific sales.

THE COURT: What was said?

THE WITNESS: He was asking me, "How are those sales doing?"

I said opthalmic sales we thought were doing better, that scientific instrument sales had not been very good the prior year and we didn't see that there was a lot of change, that we were thinking there could be, but we would have to wait and see.

BY MR. LIMAN:

Q Now, did Mr. MacCallum ever ask you, while he was in your office, to use the telephone?

A No,sir.

Q Did he say anything to you about any plans to change a recommendation on a stock?

A No, sir.

Q Did he convey to you any sense of urgency, that he had to get somewhere in a hurry?

MR. GREENSPOON: Objection to that, your Honor. I think he ought to ask him what he asked him.

Q Was there anything said about the fact that he had to make a telephone call anywhere?

A No.

Q Did he in fact travel with you downtown

to Rochester when you went to your bank meeting?

A Yes.

Q And you dropped him off at a corner?

A Yes.

Q Did he say he was going back to New York?

A Yes.

Q And you then attended a bank board meeting, am I correct?

A The board of directors of the bank had their usual monthly meeting, which I attended at 11:00 o'clock.

Q And you were there from around 11:00 to 2:00.

A Yes, sir.

Q And while you were at the bank, did anything come to your attention about trading in the stock of Bausch & Lomb?

A Yes.

Q And what did you find out and how did you find it out?

A As I was getting my hat and coat, which was located in a little closet next to a door near the entrance, I overhead in that immediate office some comments about, something like, "Bausch & Lomb is

doing it again," or some words to that effect.

And my ears perked up and I walked into the office and I asked, "What is going on?"

The fellow was the executive vice-president in charge of their trust operation, as I recall. He had a little box on his desk which was used to obtain quotations, and he punched a couple of buttons and he told me that Bausch & Lomb stock at that point had already traded something like 330,000 shares and that the stock was, as I recall, at about 128, which meant to me that it was down around seven points or so at that point.

And I just kind of groaned and walked out.

THE COURT: 330,000 shares.

THE WITNESS: Yes.

THE COURT: That would be at, you indicate, about 1:30?

THE WITNESS: No, sir. A little later than that. Closer to 2:00 o'clock. I don't know the precise time.

BY MR. LIMAN:

Q Did you attribute this trading to anything?

MR. GREENSPOON: Objection, sir.

THE COURT: Yes. Sustained.

MR. LIMAN: Your Honor, his state of mind is important here. I want to get his state of mind at this point.

THE COURT: Did you say anything to this gentleman?

THE WITNESS: No, sir.

BY MR. LIMAN:

Q Did you reach any opinion yourself? Did you form any opinion yourself about what the trading meant?

A Yes, I did.

THE COURT: I deem an objection to have been taken.

MR. GREENSPOON: Yes, your Honor.

THE COURT: I will overrule it. I will allow it. It is not for the truth of the matter asserted but merely to attempt to ascertain the witness' state of mind.

MR. GREENSPOON: That would be my objection, sir.

THE COURT: Very well.

All right. Now you can tellus.

A (Continuing) I believe that the various

factors that we had talked about earlier were all contributing to this unusually heavy activity in the stock.

Q What factors are you referring to?

A And I felt that of most significance was the Warner-Lambert announcement. I also felt that the Senate investigations could have had some effect. I assume that the big -- or I had known already that the big block of stock, in the telephone conversation, when I asked MacCallum to leave the office, I also had another call with the-- the telephone conversation with Don Miller of Goldman, Sacks which was really a continuation of the call the preceding day, and he told me then that the 100,000 shares had cleared.

So I figured, "Okay. That accounted for 100 of the 330."

But I also assumed that the Warner-Lambert announcement was really having a violent effect on the stock.

Q Now, when you returned to your office --

THE COURT: Did you call your office prior to your return?

THE WITNESS: No, sir. It only takes a few minutes, your Honor.

Q Did you believe that anything that had transpired in your interviews with the analysts that day and the day before had any effect on this stock or was responsible for this trading?

MR. GREENSPOON: Objection to that, sir.

THE COURT: Sustained.

Q Mr. Schuman, does the stipulation of facts 53-56, which I will read, accurately set forth what transpired next when you returned to your office?

THE COURT: Why don't you read it to yourself. It has been filed as part of the record. Just read it, sir, and tell us whether 53 through 56 accurately reflect what happened following your return to the Bausch & Lomb offices at approximately 2:00 p.m.

(Pause.)

A That is correct.

Q Can you tell me when you first telephoned Mr. MacCallum at 2:24 p.m., as set forth in Finding of Fact 53, whether you intended to disclose to him what your earnings forecast was?

MR. GREENSPOON: Objection to that, sir. I think he ought to be able to tell what he said,

what he did.

THE COURT: I am going to take it to reflect upon his state of mind at the time, because what he did in the next few minutes is rather crucial, and I think it is helpful to the Court to examine his state of mind at the time. And I am willing to let him tell me in his own words what was in his mind, and then we will go forward.

If you can answer Mr. LIman's question as to your intentions, I am going to let you do so and I am going to consider it in connection with your state of mind on that day and at that time.

Do you want to hear the question again?

THE WITNESS: No, sir. I assume what you are asking me, or what Mr. Liman is asking me, is to explain what I was thinking at that time?

THE COURT: Well, his question is somewhat more narrow.

Q Did you intend, when you asked your secretary to call MacCallum, to tell him what your earnings figure was?

A Absolutely not.

Q Then why did you?

A Well, that is a question I have asked myself

a thousand times.

(Pause.)

Excuse me a second, your Honor.

THE COURT: Take as long as you require. It is an important question.

THE WITNESS: It is not that I am thinking. It is just a very painful thing.

THE COURT: I can appreciate it must be. But, at the same time, take your time and respond to the question, which is a rather broad question.

A (Continuing) I was agitated. I was extremely agitated when Mr. Harby told me that -- what he did -- I don't have to repeat all that -- and I was -- I instantly decided that I was going to go with a number.

That is why I called our financial people down. I certainly didn't expect to talk to MacCallum. I certainly didn't expect to -- obviously it was the furthest thought from my mind to give a number to MacCallum at that point.

I certainly was agitated, but I felt before talking to the Wall Street Journal, because I also had made up my mind I was going to go the Wall Street Journal route as the fastest route, and

it was just a -- I was moving very fast, I was very intense about it. I don't know that I can really rationalize what I did. It popped out. Why it popped out has of course been plaguing me, because it has been contrary to everything I did. I have had a lot of consequences from this.

It seemed to me terribly ironic that of all people that this should happen to me.

I was trying to be very careful. I knew I was dealing with a very, very sensitive situation. I wouldn't let anybody handle it, not because I enjoyed it or wanted to have any ax to grind or any benefit. I knew the company had a severe problem and I really thought I could handle it.

I have been trying to rationalize it. maybe what you said yesterday was the answer. I don't know; you know, the "upper scope."

I don't think there is any -- maybe I rationalized it in another way. I knew I was going public. Maybe that had some effect on me. I don't know. I didn't expect to talk to MacCallum. I guess maybe that partly threw me. And he said, "60 cents." I just kind of responded.

What else can I say, your Honor?

BY MR. LIMAN:

Q Mr. Schuman, it is fair to say that you regret that number came out?

A That is a mild understatement.

Q Regrettable as it may have seemed to you, did you expect MacCallum to be trading on the number you gave him?

MR. GREENSPOON: Objection, sir.

THE COURT: I will take it for his state of mind. I am not sure that it adds very much to the picture.

A No, sir.

Q Why not?

THE COURT ~~MR. GREENSPOON~~: I will take again for what it is worth.

A Whether that was part of my thinking, I can't tell you. It is speculation. I knew the hour was also --

MR. GREENSPOON: Move to strike anything dealing with speculation.

THE COURT: Yes. We have to do that. Let's have Mr. Liman's last question read back to the witness.

Q Why didn't you expect him to trade?

A It didn't make any sense to me. He had come out with, first of all, '60 cents." It wouldn't make any sense that they would do anything with my "70-80 cents."

And it just didn't register. I didn't think that that -- at that point -- I am trying to speculate now.

Q Then don't.

MR. GREENSPOON: I move to strike.

THE COURT: Yes. I will strike any speculation. But perhaps Mr. Liman wants to restate the question.

MR. LIMAN: I think as far as he got we are okay.

A It was an instantaneous thing, what I did. And the time interval was zero. I didn't intend to say anything.

Now, to ask me had I rationalized it and thought about it, there was no such thing involved.

Q Mr. Schuman, after speaking to MacCallum the second time and correcting the figure you gave him, did you give the same corrected figure to Mr. Dorfman?

A I gave -- yes, I gave Mr. Dorfman the 65-75

cent number.

Q And what, if anything, did you say to Mr. Dorfman about the need to get that figure published?

A I wanted it published.

THE COURT: Just bear with me a moment.

(Pause.)

Q And the next morning, am I correct that it was the Wall Street Journal column by Dorfman which referred to a 65 to 75 cent estimate confirmed by you?

A Yes.

Q And the trading was not permitted that day, am I correct?

A That is correct.

Q Now, after you had given the figure to Dorfman, you testified that you got calls from other people on Wall Street on the 16th? Do you recall that?

A Yes, sir.

Q And you mentioned names of Mr. Einhorn, Mr. Furman, Mr. Greenberg, Mr. Blank of Morgan Guaranty, and a shareholder by the name of Dugan, am I correct?

A Yes, sir.

Q And you told these shareholders that

the figure was going to be published in the Wall Street Journal?

MR. GREENSPOON: Objection. There is no indication that they are shareholders.

Q (Continuing) Did you tell these persons that the figure would be published in the Wall Street Journal?

A Yes.

Q And can you tell me whether these calls occurred after the market was closed?

A I believe all the calls were after the market was closed.

THE COURT: Well, let's get the time when you had these calls, made these calls.

Q Were they after 3:30, to the best of your knowledge?

THE COURT: No. What time was it.

Q (Continuing) What time was it?

A I don't know for certain, your Honor, but it is possible that the conversation with Mr. Baker of American Express, the gentleman who had bought the 100,000 shares, might have been before 3:30. But I think, I would be pretty sure, that the calls of the other gentlemen were after 3:30. I don't know

what the record will show on this.

THE COURT: Would they have been between 3:30 and no later than 5:00 o'clock?

THE WITNESS: Yes, sir, with the exception of Mr. Dugan, who was sometime after 5:00 o'clock.

THE COURT: About what time was Mr. Dugan?

THE WITNESS: Oh, I would say probably 5:30. It could even have been 6:00 o'clock.

THE COURT: And, finally, on March 16, 1972, was the stock of Bausch & Lomb being traded on any exchange other than the New York Stock Exchange, for example the Pacific?

THE WITNESS: I didn't know if it was traded, your Honor. It was not listed, and I had had specific conversations with the president of each of those exchanges, explained to them why I didn't feel that it would be appropriate for us to list at that time. And it was surprising to me to learn afterwards that the stock could be traded without being listed, and I still, frankly, even to this day, don't really understand that.

Q You had declined to have your stock listed on the Pacific and the other regional exchanges?

A Yes.

Q Now, Mr. Schuman, do you still speak to analysts and stockholders about company affairs, other than at the annual meeting, which is a public meeting?

A Other than one meeting with the New York Society of Financial Analysts at which several of us spoke before a very large group of gentlemen, I have not spoken, by telephone or meeting, in any way with any financial analysts.

THE COURT: Since when?

THE WITNESS: Since Thursday, the famous Thursday of March 16th.

Q What practice and procedure does Bausch & Lomb have for handling inquiries from analysts and shareholders?

MR. GREENSPOON: Objection to that on the grounds that there isn't any evidence that they do have any.

THE COURT: I think you have to add an "if any" or perhaps go back to a prior question: do you?

Q Do you have a procedure?

A Yes, we do.

Q What is that procedure?

A I perhaps could tell you what it is now and I could tell you what it was after, and I don't know how you want me to explain it, because I am dealing with different people.

THE COURT: I am interested primarily in knowing how it is now.

THE WITNESS: It essentially isn't any different. It is just that other people are involved, because we have had a change in people.

Right now, any call that comes in is handled only by the Director of Corporate Communications, and if there is a request for a meeting, he will agree to a meeting, but he would not sit alone with them. We try to have always -- I should say it a little differently.

We wouldn't have a session without having a second person with him, and normally that would be our Vice-president of Finance.

Now, the instructions that these gentlemen have is that they are not to discuss anything that we have not already printed in an annual report or in a quarterly statement. If a question comes in which is from a newspaper or something that

would indicate a sensitive situation, our Director of Corporate Communication would refer the matter directly to me.

And then, based on my judgment, that starts a whole chain of events, because we don't do anything any more without a lot of people being involved, and primarily we would also include our outside counsel, always. And it has gotten to be very expensive and very time consuming and it is a very painful process, but, as you can well appreciate, we are extremely sensitive to this whole situation.

Q Why, if it so expensive, do you take inquiries at all from analysts?

A Well, that is a good question too. I wish, frankly, the SEC would issue some kind of order that would tell all companies not to deal with it. But we are still complying with the open door policy and we understand that that is still our obligation.

MR. GREENSPOON: Your Honor, I move to strike that.

MR. LIMAN: Your Honor, I think that is a pertinent question.

THE COURT: I am going to leave it in the record, and I would suggest that, if the SEC would

choose to do what the witness has indicated, there might be a First Amendment problem if someone were to contest on it.

MR. LIMAN: They recommend it, your Honor.

THE COURT: I am not talking about recommending. I am talking about speaking. What can they recommend?

MR. LIMAN: They recommend the open door policy of speaking to analysts. That is their policy.

THE COURT: Singly or in large groups?

MR. LIMAN: Singly. And the New York Stock Exchange does. And if you will read Mr. Loomis' statement, that is the obligation of every company.

MR. GREENSPOON: Your Honor, I move to strike all of that colloquy --

THE COURT: That is argument. That is not probative of anything. But I will read the documents to which reference has been made.

MR. LIMAN: Right.

THE COURT: Those would be in the form of evidence.

I take what has just been said as argument.

MR. LIMAN: Those are in any event statements

by the SEC, by the Commissioner, but the New York Stock Exchange.

Q Your company is still listed on the New York Stock Exchange, isn't it?

A Yes, sir.

I haven't finished my whole description, if I may finish another part of it.

THE COURT: I would like you to. We all interrupted you. And the last thing we want to do at this point is interrupt you in this area.

THE WITNESS: In addition, as you know, the Soflens area is very sensitive and we have placed an attorney in that division and every piece of paper, regardless of the nature of it, that is anything that they write, the marketing people write or anybody in the division writes, has to be reviewed on a regular, formal routing control plan and, of course, the purpose of it is to be very certain that nothing is said and if there is anything that is at all questionable, that comes over to corporate headquarters and I get into it and again I start that whole process of our outside counsel and inside counsel and everybody meeting and talking and being sure that there is not the slightest doubt.

Of course, if we have the slightest doubt then we would lean over backwards to issue a press release or anything of that kind.

I also have often at meetings with our officers talked about this subject and as I know you are aware by now how painful it is, I impress on them over and over again the need for care. We are very vulnerable and people can make mistakes easily I guess.

THE COURT: Mr. Schuman, are these instructions to which you have made reference written or are they part written and part oral or are they oral?

THE WITNESS: They are oral, sir, and I haven't pushed the need to get them in writing because we discussed it about doing that. I felt that I have a little different philosophy of that. I am not too sure that a thing in writing is that meaningful because I want this to be a live thing and what I said to them is simply and I don't want some esoteric dissertation of what is material and what isn't material.

I have tried to lean over backwards the other way to make it that we go so far that we don't want them to exercise judgment which something in writing might give them the idea that they have to exercise judgment.

We are saying very simply if it isn't already in print we can't talk about it.

THE COURT: May I make this inquiry?

Do you keep some sort of a book or file of what is "in print"? I am concerned about how the director of corporate communications and others

who may deal with this problem are apprised of whether or not a matter is in print.

THE WITNESS: The only thing we are really talking about being in print of any significance in this area would be the annual reports and quarterly reports, press releases and product information, that is, in terms of brochures.

BY MR. LIMAN:

Q When you say in print you are referring to having been published by your company?

A By Bausch & Lomb, yes. I am sorry.

Q Now, you talked about the fact that the person who now is your liaison with the company with the financial community is the director of corporate communications. What is his name?

A Ronald Eisen.

Q Did you hire him after finding out what his background was in this area of communications?

A Yes.

Q Could you, without giving us a whole history, tell us whether he had any experience in this area?

A Yes.

Q What was his experience?

A Well, he had I think considerable experience in this area. He worked with, and this is kind of coincidental, the Ruder & Finn firm that came up earlier with Mr. Norman Weissman and more recently he was with Ward and apparently Ward had a lot of background and experience in this area.

Q Is that Ward Foods?

A Yes.

THE COURT: I think they call themselves Ward Industries I think.

Q We have to be careful with that name here. You said the man worked for Ward.

You mentioned Ruder & Finn and that is the public relations company?

A Yes.

Q Now, can you tell us whether there have been in the last years any complaints brought to your attention about information that was released by this man?

A No, sir. There hasn't been any, if that is the question.

THE COURT: When was he hired by the firm?

THE WITNESS: In the fall of 1972. Our

previous man who was also very competent in this area died.

THE COURT: That was the gentleman you indicated who died in January of 1972?

THE WITNESS: Yes, sir.

Q I want to direct your attention to the letter to customers put out in the fall of 1973 which you were questioned about on your direct examination. Do you recall that?

A Yes, sir.

Q When was the first time that you knew that letter had gone out?

THE COURT: What exhibit is that?

MR. LIMAN: Plaintiff's Exhibit 48.

Q When was the first time Plaintiff's Exhibit 48 was brought to your attention?

A After it had been called to the attention of our financial vice-president by an analyst in Wall Street.

Q When you found out that the analyst had attached some significance to this letter, what did you do?

A We put out a press release.

Q Was that press release reviewed by your

counsel?

A Yes. I think more than reviewed by him. I am quite sure that he was largely instrumental in preparing the press release.

Q Have you adopted any procedures for review of letters that go to your customers?

A Yes.

Q What procedure is that?

A I think I indicated to you just a short while ago. These letters are reviewed by an attorney and we are trying to be very careful. They are reviewed from the standpoint of any possible impact or question of materiality so that if he has the slightest doubt, they are referred to myself and Mr. Allen and our outside counsel and we discuss it and take appropriate action.

Q Am I correct that you are talking about now even letters that go on to customers and not analysts?

A Yes, you are correct.

THE COURT: The gentleman you say who reviews them in the first instance is one of your internal attorneys?

THE WITNESS: Yes, your Honor.

THE COURT: What is his name?

THE WITNESS: Manello, M-a-n-e-l-l-o, Seymour Manello.

Q Do you regularly read the Wall Street Journal?

A Yes, sir.

Q I show you Defendants' Exhibit D which is an article of Wall Street Journal headed, "Security analysts get SEC suggestions on handling of inside corporate data" and refers to a speech by Mr. Loomis.

Do you recall reading the Wall Street Journal's coverage as reflected on this exhibit of the Loomis speech?

A I don't recall this, this specific article. This is dated when?

Q October.

MR. KAPLAN: October, 1968.

A I can tell you that I was interested in the subject long before 1972 and I followed those kinds of articles as they appeared in the Wall Street Journal and other places.

Q But you don't remember the actual body of this article?

A No, sir.

Q There has been a stipulation on this subject but I would like to cover it even more fully.

Am I correct that you have not sold any shares of Bausch & Lomb stock?

A You are correct.

Q Is that also true of your family?

A That is correct.

Q THE COURT: Your family, if I may inquire, consists of who?

THE WITNESS: Well, my wife and children, three children.

THE COURT: How old are your children?

THE WITNESS: 28, 26, 24.

Q And your age?

A I am about to be 60 in September.

THE COURT: When you speak of your family, I would ask you to answer the question again relative not only to yourself and your wife but also your children and if any of them are married, their spouses.

THE WITNESS: The children are not married.

THE COURT: You say that you have not sold any stock nor has your family?

THE WITNESS: Well, all the stock is in my name.

THE COURT: There is no Bausch & Lomb stock so far as you know in the name of your wife or any of your three children?

THE WITNESS: Absolutely certain of that, your Honor.

Q Can you tell me whether you had any interest in 1962 or at any time in driving the price of your stock down by the release of adverse information?

A 1972?

MR. GREENSPOON: 1962? I object, your Honor. 1972, I still object.

THE COURT: Overruled.

Q Did you?

A No, sir.

THE COURT: I would like to follow something out for a moment.

I believe you indicated your age is 60?

THE WITNESS: I am going to be 60 in September.

THE COURT: Does your company have a mandatory retirement policy?

THE WITNESS: Age 65.

THE COURT: Thank you.

MR. LIMAN: I have no further questions.

MR. MORRIS: May I have just a moment, your Honor?

THE COURT: Yes.

(Pause.)

BY MR. MORRIS:

Q Just a few questions, Mr. Schuman.

With respect to the policies that just have been referred to that exist in the company having to do with the handling of inquiries from analysts and shareholders, would you state what the intention of the company is with respect to the continuation of those policies?

A That we would continue those policies.

Q Is it fair to say that not only Daniel G. Schuman but any officers of the company are extremely sensitive to matters of conversations with analysts as a result of the experience of March 16, 1972?

A Very much so.

Q Have you been familiar both before and after 1972 with the expressions in the press by members of the Securities and Exchange Commission having to do with the preparation of guidelines for the conduct of interviews between corporations and analysts?

A Yes.

Q Over how long a period of time have you become knowledgeable with these publications?

A Well, as I recall Texas Gulf started so much of what has appeared in the press and I am aware that various commissioners have stated from time to time that they intended to see that the SEC prepared guidelines as to what is material and there have been articles or stories that appeared in the press that indicated that as commissioners have changed they have been unable to prepare such guidelines and I think more recently something that indicated that a project of some kind on this purpose had been abandoned and they were unable -- but I am telling you what I recall about press stories.

Q You referred in your testimony to an awareness of an open door policy of the Stock Exchange and of the SEC?

Q Has that policy been the subject of discussion between you and other officers of the company?

A Yes.

Q Both before and after March 16, 1972?

A I am not sure that -- stating it differently, it wasn't with officers. Mr. ~~MacCallum~~ was not an officer of the company.

Q Was it the subject of discussion between you and other persons in the corporate staff of the company both before and after 1972?

A Yes.

MR. MORRIS: I would like to now renew the offer into evidence of Exhibit A which is the copy of the SEC release as to which your Honor reserved an objection.

This is stipulated that this is a copy of the SEC release No. 5180 dated August 16, 1971 which actually came from the files of Bausch & Lomb.

MR. GREENSPOON: I renew again my objection to that. The testimony of the witness at this point has not touched In any way with respect to this document. It has not been shown and the foundation has not been properly laid.

Furthermore, the other basis for my objection would be that it deals with stock in registration and that is not the case here.

THE COURT: Isn't this something that I would, could and undoubtedly will take judicial notice of even if it were not admitted as an exhibit in this case?

MR. GREENSPOON: I would have to concede that your Honor could certainly take judicial notice.

THE COURT: It seems I have done it before.

MR. GREENSPOON: I merely want to indicate that I don't think that it is relevant to the issue in this case among my other objections.

THE COURT: I notice that it speaks for itself and I would suggest that you are correct in your statement that the release bears on its face in large capital letters "Guidelines For Release of Information of Issuers Whose Securities are in Registration."

And Footnote 1 indicates the definition but at the same time I know that I would consider this and will take it and I don't know that it is really necessary for us to ask this question of the witness but I am going to do it so the record will

be complete.

Mr. Schuman, have you ever seen SEC's release No. 5180 prior to today and if so, when?

THE WITNESS: I did see it prior to today.

THE COURT: Now the second part of my question if you can respond, if so, when?

THE WITNESS: I am trying to struggle with that and I don't know if I can give you a good answer but it would be after March 1972.

I would like to make one more comment if I may?

This appears to have come in originally to our treasurer who worked at different times directly for me and he routed it down to Don Allen our corporate counsel and I see that the date on here of August 1971 and this apparently is when it came into the company and appears to have come in to the treasurer first, to describe the document a little more.

MR. LIMAN: Your Honor, you noted as did the SEC that this refers to stocks in registration.

I think that makes it even more probative because here the SEC is saying that at the time of

greater sensitivity for a company it s ill must respond to legitimate questions about the operations of a company from the financial community and to me it is not -- I would urge your Honor -- I don't know why we have even gotten into a position where we have to offer into evidence a Loomis speech when your Honor in looking at this area is obviously free to read what the SEC and its commissioners have said and the New York Stock Exchange says and they say that companies should be speaking to analysts. They have to be careful to avoid material inside information but I don't think that is the issue here.

Is the SEC now saying that you shouldn't talk to analysists? Of course not. And once you say that a person should talk to analysts you put in him the ultimate judgment of whether something can be discussed and if he makes a mistake, then the question is what should be done about it and if it is an innocent mistake, my position is you don't enjoin him.

THE COURT: Well --

MR. GREENSPOON: May I have a chance to --

THE COURT: I will give Mr. Greenspoon an opportunity to respond to the summation at this time if he wishes.

MR. GREENSPOON: I think your Honor knows my position on that issue.

THE COURT: Very well. Let me suggest this:

It certainly is not a per se violation of anything for a company whose securities are publicly traded to respond to legitimate inquiries for factual information about the company's financial condition and business operations, just so long as the information which is furnished is not what might be considered material inside information furnished to one in preference to all.

My understanding of the SEC's position is that if the information is made simultaneously available publicly, this is perfectly proper. My understanding further is that the SEC takes the position that if the financial information of a material nature is disclosed selectively to individuals rather than generally and publicly, the person who disseminates the information is subject to liability.

I am not going to try to tie that into the facts of this case, that is for another time during the course of this trial.

But I would take that as the overall position of the Commission. Whether I have the guidelines which are contained within release No. 5180 or just determine that I should exercise what I think is common sense.

Mr. Greenspoon, if you wish to comment on what I have just said you are perfectly free to do so at this time.

MR. GREENSPOON: I have no comment to make, sir.

THE COURT: Well, so the record will be complete, I overrule the objection and I will receive Defendants' Exhibit A.

I would note that I think under any circumstances the record is sufficient for it to be introduced against Bausch & Lomb. It was obviously from its face received into the company, the witness so testified. It was received in prior to March of 1972, to wit, in August 1971.

I suggest that even though the witness may not have read the document itself, I would con-

sider that he was at least generally aware of the guidelines as an active co-chief executive officer of this publicly held company.

(Defendants' Exhibit A for identification was received in evidence.)

xx MR. LIMAN: As to that, your Honor, I renew the offer of the Loomis speeches and I really think that the Court of Appeals, anybody could read what the SEC has said and --

THE COURT: I have even seen a footnote from the New York Times in some of the recent opinions.

MR. LIMAN: I am just directing your attention to what he said there among other things. He talks about the fact that --

MR. GREENSPOON: Is this an exhibit?

MR. LIMAN: I am referring to Exhibit E but I don't think it must be an exhibit. When you publish something that is called corporate disclosures and inside information, a panel interview with Mr. Philip A. Loomis, Jr., general counsel of the SEC, that we shouldn't be arguing here about whether it is appropriate or not appropriate.

He was asked very specifically some of

the questions that we have dealt with here such as whether or not the policy that Bausch & Lomb is following of seeing analysts, I would like to urge your Honor to read that and I have a very specific question here --

MR. GREENSPOON: Wait a minute, you are reading it to his Honor and this thing is not in evidence yet.

THE COURT: Let me have the document. I won't read it until we determine whether or not I should read it.

The document which was handed to the Court by Mr. Loomis appears to be a panel interview with Mr. Loomis conducted in October of 1968

MR. LIMAN: And again we would stipulate, your Honor, that if Mr. Loomis when talking to this group of analysts said things which he shouldn't have said, we are not seeking an injunction against him but he put it in the public domain.

THE COURT: I don't find that necessary for my determination but the record should be clear in certain areas. This is Defendants' Exhibit E for identfication.

MR. LIMAN: Right.

THE COURT: I would ask the witness first to go one step at a time. Whether, prior to my showing this document to you today, you had ever seen it before?

THE WITNESS: I don't recall, your Honor.

THE COURT: You have no recollection one way or the other of seeing this interview and having read it or having had it read to you?

THE WITNESS: That is correct.

THE COURT: Mr. Liman, just so the record again is clear, does this document come from the files of the company?

MR. LIMAN: No, your Honor. I ask you to treat this like you treat a Law Review article.

MR. GREENSPOON: Oh, come on.

THE COURT: I would suggest this, that I really can't consider this to be an admission against interest. Let us take it one step at a time. I have difficulty in appreciating that even a general counsel can make an admission binding on the Commission. However, I do believe that it provides helpful background to the Court of a type that if I were doing research in connection with an opinion and chose to read a Law Review article,

as has been pointed out, and other things which I felt were helpful comments in connection with the law and its administration, knowing frankly that it is a rubric of administrative law that in order to make certain of your determinations you look to the manner in which the administrators themselves have acted, I think I should in this nonjury context consider this matter and I will do so and if it suits you that I take the document as an exhibit, I note that the Government has objected and I will overrule the objection and I will take it, Exhibit E and any other speeches including H, I, L, M, R, U, W and X for identification.

MR. MORRIS: Those were the ones that we were going to offer.

MR. GREENSPOON: I object to each and every one of them upon the grounds previously stated, no foundation among other things.

THE COURT: That objection has been made and I assume that the witness with the possible exception of one of these documents has not seen them and they don't come from his files.

MR. LIMAN: I am not offering them on that basis because he said that he doesn't recall whether

or not he saw them.

I will tell your Honor that he saw it, if he saw it it was in connection with the preparation for the trial of this case.

MR. MORRIS: We will mark this exhibits and I think that is it, your Honor.

THE COURT: Then we will mark the exhibits and then I will turn to Mr. Greenspoon to inquire if he has any redirect examination.

(Discussion off the record.)

(Defendants' Exhibits E, H, I, L, M, R, U, W and X were received in evidence.)

xx THE COURT: If it is convenient to all we will recess for lunch at this time it being 12.30 and can we resume at 1.30?

Is that agreeable to everyone or do you require a few more minutes?

MR. LIMAN: No, sir.

THE COURT: 1.30.

(Luncheon recess.)

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jgrf pm 1

AFTERNOON SESSION

1:30 p.m.

D A N I E L G E R A L D S C H U M A N,

resumed the stand and testified further as follows:

THE COURT: Good afternoon, everyone.

Mr. Greenspoon.

REDIRECT EXAMINATION

BY MR. GREENSPOON (Continued):

Q Mr. Schuman, when you spoke with Mr. MacCallum, you gave him no figures on earnings for the rest of the Bausch & Lomb line and you gave him no figures on earnings with respect to the Soflens for the first quarter, is that correct?

A Yes, sir.

Q So that in neither instance did you disclose anything to him, any numbers, with respect to earnings?

A That is correct.

Q Now, prior to March 15th and March 16th, Bausch & Lomb had issued no releases, had they, respecting the introduction or any delay in introduction of the aphakic lens?

A No, sir.

Q And, similarly, prior to those two dates, Bausch & Lomb had issued no public press releases with respect to when the minikit would come out or would not come out, isn't that right?

A That is correct.

Q And, similarly, prior to those two dates, Bausch & Lomb had issued no public press releases regarding the fact that kit sales were down in the first quarter, is that correct?

A That is correct.

Q And, finally, sir, prior to those two dates Bausch & Lomb had issued no public press release stating that there was a reversal or a flattening in the Soflens sales, is that correct?

A That is correct.

Q Your counsel showed you earlier this morning -- let me see if I can get this straight now, with all these letters -- the Smith Barney research report dated March 3rd, which I believe is Plaintiff's Exhibit 74.

Is that Defendants' Exhibit ZZ, or old 52?

MR. KAPLAN: 52 is the wire report. 74 is the typed copy.

MR. GREENSPOON: May I ask this question, then, of counsel: Do we agree that 52 and our 74, or whichever one of yours is the typed report, is the same as my 74, which is the report itself?

MR. KAPLAN: Plaintiff's Exhibit 74 is the same as the wire, which is 52, it was once Defendants' Exhibit 52, now Defendants' Exhibit ZZ.

MR. GREENSPOON: And is that the one which was shown to Mr. Schuman?

Q In any event, I will show you what is Plaintiff's Exhibit 74.

A You showed me the wire release.

MR. GREENSPOON: Is it agreed that these are the same, the wire release and the typed report?

MR. KAPLAN: The stipulation of facts states that one substantially restates the other.

MR. GREENSPOON: All right. Your Honor, I should like to draw your attention, since this is in evidence, to this report on page 2, the last paragraph.

THE COURT: What exhibit is that?

MR. GREENSPOON: This is Plaintiff's Exhibit 74, sir.

All right. I have it in front of me.

jgrf 4 Schuman-redirect

Q Mr. Schuman, your testimony today was that you had read this report. This paragraph says:

"These cross currents will play a significant role in first quarter comparisons. If the aphakic lenses are introduced early enough in March, we think that there is a good chance that earnings will match the $1,02 per share earned in the fourth quarter of 1971. If not, earnings for the quarter might be closer to 80 to 85 cents per share. Earnings were 27 cents per share in last year's first quarter before restatement to reflect the acquisition of Buschnell Optical. However, for the year as a whole we think that the positive factors will be predominant and we continue to estimate $5 to $7 per share."

Now, Mr. Schuman, this is the report, is it not, where Mr. Burkhead withdrew his buy recommendation of Bausch & Lomb stock, isn't that correct?

A Yes.

Q And you discussed with Mr. Burkhead, when he was in your office on March 16th, his report of March 3rd, isn't that correct?

A I don't believe we discussed the report per se.

Q Did you discuss with him his withdrawal

of his buy recommendation?

A I don't recall that we got into any specific discussion about that point. If I may amplify, I had expected that we would, but I didn't raise that question with him and he didn't raise it with me.

Q So that your testimony presently is then that you did not discuss the matter with him, is that correct?

A That is correct.

Q Now, sir, directing your attention, and your Honor please, to, I believe it is, RRR Defendants', Plaintiff's Exhibit 74 --

THE COURT: It must be another plaintiff's number --

MR. GREENSPOON: Wait a second, sir. You may be right. 70. I beg your pardon.

THE COURT: All right. Let me turn to that, 70.

MR. GREENSPOON: I would like to direct your Honor's attention to page 11.

THE COURT: This is Mr. Sanders' report of January 24, 1972?

MR. GREENSPOON: That is correct, sir.

THE COURT: And what do you want me to

look at on page 11?

MR. GREENSPOON: I would like your Honor to look at the first full paragraph under "1972 Estimate."

This reads:

"We continue to believe that opthalmic sales and earnings will advance by approximately 8 to 10 per cent in 1972 and that some recovery of domestic instrument earnings may develop later on this year. We anticipate that non-Soflens earnings might approximate $1.75 per share in '72 on sales of $155 million versus an estimated $1.60 per share on sales of $142 million in '72, including Buschnell."

MR. MORRIS: Pardon me. What are you reading from?

THE COURT: From Plaintiff's Exhibit 70, page 11, first full paragraph on the page, under the heading "1972 Estimate."

Do you have that?

MR. MORRIS: Yes, sir.

THE COURT: All right.

MR. GREENSPOON: "Total corporate earnings for this year are estimated to range from $4.50 to $6.00 per share with the single best estimate being $5.25 per share.

"Our estimates imply first quarter earnings of 85 to 90 cents per share versus an estimated restated 30 cents per share in 1971, which assumes NPD royalties from January 1, 1972. We expect this to build up to a median estimate of $1.60 per share by the fourth quarter or at an annual rate of close to $6.50 per share.

"We continue to believe it possible for earnings to approach $8 per share in '73, given no change in competitive conditions as it relates to Soflens."

Q Mr. Schuman, you had read this report, had you not?

A Yes.

Q And did you discuss this report with Mr. Sanders?

A Excuse me. If I may again quibble, I don't know if I read that one. I read his draft report. And to the extent that it is the same, I say I read it. I don't remember specifically reading that.

Q You don't recall that there were any differences, do you, in what you had read in this?

A No.

Q The earnings figures which he projected were the same in what you read?

A I don't recall. I assume they would be.

Q And this you had read on or about the time that it came out, is that correct, in January of' 72?

MR. LIMAN: Objection. The document that he was shown is the draft, which is, I think, two weeks earlier. That is what we put in evidence.

THE COURT: You object to the form of the question?

MR. LIMAN: Yes.

THE COURT: Sustained as to form.

Q Whatever the document you read, sir, you read the estimate in January of 1972, is that correct?

A Yes.

Q When you spoke to Mr. Clancy and Mr. Wien, I believe you stated this morning in essence, and correct me if I am wrong, that it was difficult to really know what Soflens was doing, it was a new product, and so on; do you recall that?

A Yes.

Q Now, at the time that you spoke to Wien and Clancy, you had in your possession a 74 estimate, did you not, that had been given to you by Mr. Hooley on March 13th?

A Yes.

Q And so at that time you knew pretty well where Soflens was going, didn't you?

A We had an estimate for the first quarter, yes.

Q And that was the best estimate that the company had at that time, wasn't it, sir?

A Yes.

Q And that estimate that you received on March 13th was the first time you had any different figure than those figures which I have mentioned that were in these reports that you read, isn't that right?

A Yes.

Q You knew on March 1st, didn't you, Mr. Schuman, that the Bausch & Lomb stock had dropped 10 points, approximately, on the Pacific Coast Exchange?

A No, sir.

Q Didn't Don Allen call you in Mexico

and read a press release to you and then, after Mr. Stillman got on the phone to you, didn't Mr. Allen get back on the phone and tell you that there had been a drop of 10 points on the Coast Exchange?

A I don't recall drop on the Coast Exchange. This is a matter of recollection.

I would like to ask a question. I remember, at least I believe, there was mention of a drop of a stock, but I didn't associate that with the Pacific Coast Exchange, because I firmly believed at that time that our stock could not be traded on the Pacific Coast Exchange.

Q So that you did not learn then that the stock had been traded on the Pacific Stock Exchange? Is that what you are telling me, sir?

A Yes.

Q You remain as the co-chief executive of the company, right, sir?

A Yes.

Q And sensitive matters come to you.

A Yes.

Q And you have to exercise judgment when they come to you.

A Yes.

Q And sometimes you exercise the judgment by going through the Committee, or the group that you have formed, or do you exercise it alone?

A No. Any of those kinds of matters, any sensitive matters, we talk about as a group.

Q And is that true of press releases?

A Yes.

Q And was it true in October of 1973?

A Yes.

Q You and Mr. Stillman did not make the decision, just the two of you, at that time?

A No.

Q Whom else did you call in to participate in that decision, sir?

A Mr. Allen, Mr. Atwater, Mr. Harby and Mr. Stillmar. That would have been the group.

Q How about Mr. Eisen?

A He may have been in. But we didn't include him in in any discussions in many cases. We, again -- Mr. Eisen was not kept well informed on matters going on. We wanted him to be in a position, if calls or things came in, to be able to say he simply didn't know and he wouldn't have information on which he could respond to calls.

And that is our present position now, too.

Q Your present position is to keep him in the dark?

A You can't quite say "in the dark." But to the extent that he participates in important things or to know -- or where he would know intimately what is going on in the company, he would not be aware of that information, as I would be or Mr. Harby would be or our financial people would be or our attorneys would be.

Q When did Mr. Manello join your force?

A I think in the summer or fall. It would be two years coming up.

Q '74?

A Yes. I think that is the best of my recollection.

Q All right. The procedures that you used is to have all letters, that is, similar to the October 3, 1973 letter, go through Mr. Manello. Then those procedures came into effect, did they not, after Mr. Manello came on board?

A Yes.

Q So that in October you did not have such

a procedure.

A That is correct.

Q And did the October 1973 incident prompt you to have that procedure?

A Yes. We had that procedure -- let me amend that. We had that procedure, but it wasn't said to include everything. The divisions were informed that anything that they felt was of a particularly sensitive nature should be referred through to Mr. Allen. But after the October letter we went quite a bit further in that we didn't leave anything to the divisions' own judgment as to what might be. We said we want now someone to look at everything on a highly controlled, organized basis.

Q And at the apex of this is yourself.

A Yes, sir.

Q Mr. Eugene Stillman was, at the time of the events in this case, in March of '73, the financial Vice-president of your company, was he not, sir?

A Yes.

Q And did not Mr. Stillman succeed your responsibilities in treating with the financial

community?

A Yes.

Q And Mr. Stillman is no longer with your company, is he, sir?

A He is not.

Q And you have other turnover from time to time in your company, do you not, with respect to executives?

A Yes.

MR. GREENSPOON: Nothing further, your Honor.

RECROSS EXAMINATION

BY MR. LIMAN:

Q You mentioned that Mr. Atwater reviewed that October release. Who is Mr. Atwater?

A Our outside counsel. He is the corporation attorney with the Noxin, Hargrave firm that is our general outside counsel in Rochester, New York.

MR. LIMAN: Nothing further.

FURTHER RECROSS EXAMINATION

BY MR. MORRIS:

Q Mr. Schuman, is it Mr. Lindblom who has succeded Mr. Stillman?

A Yes, Mr. Richard Lindblom.

Q And was Mr. Lindblom made aware, when he came with the company, of the current policies in connection with conversations with analysts?

A Very much so.

Q And are other people on the corporate staff who come to the company or have come since March of '72 made similarly aware of these policies?

A Yes.

Q One more question. I don't know whether this was asked before. I don't recall.

That letter that went out to the practitioners that Mr. Greenspoon has referred to, in October of '73, about how many people was that sent out to?

THE COURT: If you know.

A Well, I have a pretty good idea.

Q Your best approximation.

A But that is also telling something -- I'm not sure. That gives you a pretty good answer, perhaps, as to our practitioners.

Q Is it in the thousands?

A Yes.

MR. MORRIS: Thank you.

A (Continuing) Many thousands. I can

say that.

MR. GREENSPOON: One additional question, your Honor, if I ~~may~~

REDIRECT EXAMINATION

BY MR. GREENSPOON:

Q The people who joined your staff, as Mr. Morris just suggested, they received these instructions by word of mouth?

A Yes.

Q They didn't get anything in writing.

A That is correct.

MR. GREENSPOON: Thank you, sir.

THE COURT: You may step down, Mr. Schuman.

(Witness excused.)

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so we will proceed with Mr. MacCallum.

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D A V I D M a c C A L L U M , called as a witness by the Commission, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUSCH:

Q Mr. MacCallum, are you the same David MacCallum formerly a defendant in this action?

A Yes.

MR. RUSCH: Your Honor, the Commission makes an application at this time to examine Mr. MacCallum as a hostile witness in order to develop the testimony.

MR. LIMAN: We would object to that.

THE COURT: You called him and he is no longer a party to the action. I must defer on when or whether he is hostile. Examine him in the normal course. If I determine in his responses to your questions that he evidences hostility, then I will permit you to examine from that point on as a hostile witness, to wit, to lead him.

But at the moment I think you ought to examine him as a person who is a normal witness.

He is not a party any more and under the circumstances, I will require you to examine him in the normal course.

MR. RUSCH: Very well, your Honor.

Q Directing your attention, Mr. MacCallum, to the period January through February, March, 1972, can you tell the Court how you were employed at that time?

A Ye. I was a securities analyst employed by Faulkner, Dwight & Sullivan. I was a general partner of the firm at that time.

Q How long had you been a security analyst employed by Faulkner Dwight since that time?

A Prior to that date, since February of 1968.

Q Who was your immediate superior at Faulkner, Dwight, Sullivan in the first quarter of 1972?

A Robert Colin.

Q Can you briefly describe your responsibilities as a security analyst?

A Yes. As security analyst I am primarily responsible for investigating trends and following corporate developments primarily within

the health industry and formulating investment advice based on that intelligence.

Q In formulating the investment advice did you read the Wall Street Journal?

A Yes, sir.

Q Did you have a practice at that time of reading the Wall Street Journal?

A Every day.

Q In 1972 was Bausch & Lomb one of the companies you followed pursuant to your responsibilities?

A In the early part of 1972, yes, sir.

Q Can you briefly describe for the Court in the early part of 1972 the significance of Soflens sales to the Bausch & Lomb investment outlook?

A Soflens sales became an important factor in my opinion in the action of the securities of Bausch & Lomb beginning in 1971 and certainly in 1972 it continued to exert an important role On the action of the stock at that time.

Q In the first two months of 1972, that is to say January and February 1972, what was the main components of Soflens sales?

A The main components of Soflens sales?

Q Yes.

A Bausch & Lomb was selling the lens itself, a sterilizer which was used to sterilize the lens on a daily basis for use by the consumer and I believe that was the extent of the company's Soflens product line at that time.

Q Were the lenses sold in kits?

A Yes, the lens was sold in kits as well as I believe individually.

Q Were individual sales referred to by yourself at that time as fittings?

A I referred to fittings to reflect in my estimate the number of consumers to whom Soflens had been fitted In the field.

Kits were not sold to the consumer, kits were sold directly to the practitioners and called the fitters.

Q Was there a relationship between the sale of fittings and the sale of individual pairs of lenses to practitioners?

MR. LIMAN: I object to the form and also object unless he is going to qualify the witness on whether he knows about this particular area.

THE COURT: It is somewhat leading so I

am going to sustain it on the first ground.

Q In the early part of 1972 to your knowledge was it the practice of practitioners in the instance of fittings to reorder pairs of lenses?

MR. LIMAN: Objection unless he qualifies this witness as to the basis of his knowledge for what the practitioners were doing. If he wants to qualify him I have no objection.

THE COURT: Sustained.

Q Did you consider fittings a significant fact to Bausch & Lomb in the first quarter of 1972?

MR. LIMAN: Can I hear that question?

THE COURT: Yes, read it, Mr. Reporter.

(Question read.)

MR. LIMAN: I object to the form of that question.

THE COURT: Sustained.

Q When did you begin following Bausch & Lomb?

A In the early part of 1971. I believe February, March.

Q For what reason?

A For the reason that I felt that the

company had identified a unique and potentially extraordinarily profitable medical device and it was apparently able to reasonably protect itself against competition from alternative suppliers at that time.

That was the primary reason for following the company.

Q What was that medical device?

A The Soflens.

Q Prior to March 1972 did you have occasion to visit Mr. Schuman, chairman of the board of Bausch & Lomb from time to time?

A Yes.

Q How many occasions, sir?

A My recollection is I visited Mr. Schuman twice prior to March 1972 in his offices in Rochester.

Q Did you have occasion from time to time prior to March 1972 to call Mr. Schuman on the phone?

A Yes.

Q Briefly describe the frequency with which you called him?

A I recall it varied and my recollection it was relatively frequent. I believe it was on the order of once every month or two.

value.

I am going to let it stand. It is in the record. But I must say I can't attach very much weight to it in view of the witness' comments about how the statements came about andhow they got to be put down in the manner they did.

BY MR. RUSCH:

Q In the month of February did there come a time when you forwarded a draft report to Bausch & Lomb?

A Yes.

Q Directing your attention to what has been marked as Plaintiff's Exhibit No. 2, is that the document or copy of the document that you forwarded to Bausch & Lomb?

A Yes.

Q To whom did you forward that document?

A Apparently a Mr. Harby, the president of the company.

Q And did you receive any reply from Mr. Harby concerning this document?

A My recollection is that I did not receive any reply.

MR. RUSCH: At this time, your Honor,

I would like to offer into evidence what has been marked as Plaintiff's Exhibit 2, which is the cover letter dated February 25, 1972 on the letterhead of Faulkner, Dawkins & Sullivan addressed to Mr. Jack Harby of Bausch & Lomb and attached to which is a draft of a Faulkner, Dawkins & Sullivan report concerning Bausch & Lomb.

MR. LIMAN: Just so that we are clear, your Honor, could I just ask Mr. MacCallum if the writing on the first page of the draft report "In 1971 as a whole" -- is that your handwriting?

THE WITNESS: Yes, sir.

MR. LIMAN: And after that, Equal to 18 cents per share," is that your writing?

THE WITNESS: Yes.

MR. GREENSPOON: This document has been stipulated to as to authenticity.

MR. LIMAN: I just want the words, because some things are written in his writing. I presume "Read 2/24/72," is your writing also?

THE WITNESS: I recognize it as my writing, yes.

MR. LIMAN: Sorry. May I inquire whether this is being offered for the truth of what it asserts

or as representing the opinions of this witness at the time.

MR. RUSCH: Your Honor, this is being offered to reflect the state of mind of the preparer of this document at the time.

MR. LIMAN: I have no objection to it on that basis.

MR. MORRIS: No objection to it on that ground.

THE COURT: Received.

(Plaintiff's Exhibit 2 received in evidence.)

BY MR. RUSCH:

Q Was the attachment to the February 25th letter, which has been admitted into evidence as Plaintiff's Exhibit 2, ever distributed to anyone outside of Faulkner, Dawkins & Sullivan other than Mr. Harby?

A Not to my knowledge, no.

Q Subsequent to sending Exhibit No. 2, your February 22nd report, to Mr. Harby, did you attempt to contact Mr. Harby concerning the report?

A I don't recall. I don't believe I did, no.

THE COURT: Did you receive any response at all from Mr. Harby to your letter of February 25, 1972?

THE WITNESS: No, I don't recall having received a response. My recollection is that the matter was held in abeyance until Mr. Schuman's return to the office the week of March 13th.

Q I now show you what has been identified as Plaintiff's Exhibit 66, which is the March 2, 1972 report. Was that document ever distributed to customers of Faulkner, DAwkins & Sullivan?

A Yes, I believe it was.

Q And was it distributed to the customers of Faulkner, Dawkins & Sullivan at or about the time of March 2, 1972?

A I believe so, yes.

Q Did there come an occasion in March when you arranged to have an interview with Mr. Schuman?

A Yes. I telephoned Bausch & Lomb, Mr. Schuman's office, for an interview with him and was told that he would not be back in the office until March 13th, I believe. And I at that time made a date to see him on March 16th.

Q And did you meet with him on March 16th,

1972?

A Yes, I did.

Q How long did the meeting last and what time did it begin on that date?

A The meeting began, my recollection is, shortly before 9:00 o'clock. It ran directly until approximately 10:00 or perhaps ten minutes after 10:00. It was interrupted for approximately a 15 minute interval and resumed in Mr. Schuman's office for perhaps 15 or 20 minutes and then concluded with about a five minute automobile ride into downtown Rochester.

Q Directing your attention to that part of the interview that took place prior to the interruption, briefly what subjects were discussed with Mr. Schuman at that time?

A The subjects covered with Mr. Schuman prior to the interruption generally consisted of an examination of the company's traditional businesses. The optical products business, the scientific instrument business --

THE COURT: I don't want to know about an examination. I want to know about your conversation. I want to know what you saidto him and I want to know

what he said to you, to the best of your recollection, in exact words or in substance.

Let's start at the top. When you walked in, did you say something to him, did he say something to you? And go from there.

THE WITNESS: Well, I don't recall, aside from in general terms, the topics discussed and I don't recall, aside from generally, Mr. Schuman's answers. And I will attempt to reconstruct in my mind at this time the general topics which we discussed at that time.

MR. LIMAN: I object to the discussion of general topics and I also would object to discussions of this witness' impressions as opposed to the substance of what Mr. Schuman said.

He is in the business of gaining impressions, and that is not what is important. It is what my client said to him.

THE COURT: Let me ask you this, sir.

The conversation to which you make reference occurred approximately four years ago. Did you make notes at the time of the conversation?

THE WITNESS: Yes, sir.

THE COURT: Since you don't recall the

conversation specifically, I would ask you if those notes will assist you in refreshing your recollection to the specifics of the conversation. Yes or no.

THE WITNESS: They will assist me in refreshing my recollection, yes.

THE COURT: Mr. Liman, Mr. MOrris, do you have any objection to the notes being marked for identification, if they haven't been already, and being shown to the witness? He appears to have no specific recollection of the conversation.

If you want the matter gone into further in that regard, fine. But he said rather clearly that he only recalls general topics discussed.

MR. LIMAN: These notes have been marked for identification as Plaintiff's Exhibit 3, and obviously he has a right to show him --

THE COURT: At this point.

MR. LIMAN: -- the document.

THE COURT: Very well. I gather you agree with Mr. Liman, Mr. Morris.

MR. MORRIS: Well, I think I understand the rule, your Honor, he is required to establish that these notes correctly reflect --

THE COURT: No, no, no. He is not

offering them. This is just to refresh his recollection. My understanding is that he could have shown him anything, including a map of Rochester, and if that refreshed the witness' recollection that would suffice.

So we will go along on that basis, if that is all right with you gentlemen.

MR. MORRIS: All right.

BY THE COURT:

Q You have had placed in front of you Plaintiff's Exhibit 3 for identification. I would ask you to look at that. And then, if you can tell me that your recollection is refreshed as to the details of the conversation, starting at the top, what Mr. Schuman said to you, what you said to him, in words or in substance, you may proceed.

MR. RUSCH: Your Honor, it may be helpful for the witness to identify the first two pages inasmuch as they are different in character than the remaining pages.

MR. LIMAN: I object to that statement.

THE COURT: At this point I don't think it is necessary. You put several pages in front of

him. And, frankly, as I indicated, you can put anything in front of him to refresh his recollection. And if they do, if that will start him off to tell us what was said in this rather important conversation, I am perfectly willing to sit back and listen.

Q Do they help you to reconstruct the conversation?

A Yes, they do.

Q Would you then proceed?

A The first two pages consist --

Q Don't describe them. Using these to refresh your recollection, now perhaps you can tell us what he said to you and what you said to him. If you asked him a question, give us the question.

A Right.

Q If he gave an answer, give us the answer.

MR. RUSCH: Don't read your notes now.

Q (Continuing) Don't read them verbatim. But you can refer to them and reconstruct your memory and then proceed with your testimony.

MR. RUSCH: Briefly, what was said concerning --

A My first question --

MR. RUSCH: Mr. MacCallum, it may be helpful --

THE COURT: No. He is doing fine. Let's get him started.

He said, "My first question."

Q You started off by asking him a question, is that right?

A Yes.

Q Go right ahead.

A My first question related to the traditional business of Bausch & Lomb, and I asked in general terms how the company's traditional business was performing.

My general recollection of Mr. Schuman's answer at that time was that the business was performing satisfactorily but that for a variety of reasons that the business -- the profitability of the business was not characterized by any words like "dynamic" or "exceptionally strong."

My recollection of the interview related to -- is that I asked the question -- I asked a question about the operations of the Maryland Optical Products plant. I recall that Mr. Schuman indicated to me --

Q What did you say? What did you ask him?

A I don't recall. I don't recall what my

question was.

Q In substance.

A In substance?

Q Yes.

A "How is the Maryland plant doing? Is the Maryland plant costing you more money than you thought it was to start it up?"

Q Did he answer you?

A The answer, I believe, was that it was an expensive start-up procedure, that it involved some rather expensive staffing and that it was costing the company money to get the Maryland plant on stream.

I then asked Mr. Schuman about the scientific instrumentation part of the business, and I recall asking how was their scientific instrumentation business performing.

I recall that Mr.Schuman indicated to me at that time that the scientific instrumentation business was coming back but that it was coming back relatively slowly.

I then asked a question about the opthalmetron, which is a device which the company introduced, I believe, or was planning to introduce, in Las Vegas at an opthalmic meeting, I believe in late 1971.

My impression is that Mr. Schuman indicated to me that the opthalmetron was not going to be an important product in 1972.

Quite frankly, the notes that I am reviewing right now fail to refresh my memory as to exactly why the product was not going to be an important product.

I then asked him whether or not the business of Buschnell, which was a small binocular company and rifle sight company which Bausch & Lomb acquired in 1971 -- whether Buschnell's business was seasonal, and I recall Mr. Schuman's answer as indicating to me that it was seasonal, but my memory is not refreshed by looking at these notes, nor is my memory refreshed as to the significance of the entire conversation about Buschnell.

I then believe I didn't ask the question, but I do recall that somehow the information was indicated to me that --

MR. LIMAN: Objection to "indicated," unless you mean told to you.

A (Continuing) -- told to me that the company was investigating the acquisition of a product line owned by General Electric. The product line was, I believe, in the x-ray field. And Mr.

Schuman said to me that Bausch & Lomb was thinking about acquiring this product line.

I do remember I asked a subsequent question about that, and it appeared to me at that time that it was not a meaningful product line, nor would it have any particular meaning to the company.

BY MR. RUSCH:

Q Did he say whether he had recently met with representatives of GE concerning this particular product line?

A I see a notation here in my notes --

Q Aside from your notation, your best recollection.

A I don't recall whether he had met with the management of General Electrict about this or not. My recollection is -- I do recall my state of mind about the comment itself, and I --

MR. MORRIS: Object to his state of mind.

THE COURT: Well, I will take it because he has clearly denominated it as his state of mind, and I will carve it out when I get to certain other matters.

Go ahead. What is your state of mind?

Or what was it?

A (Continuing) My state of mind was that the proposed acquisition of this product line was relatively irrelevant.

I then recall asking Mr. Schuman about other matters outside the United States with regard to the Soflens.

The company at that time was attempting to introduce the Soflens into a number of foreign markets, and my curiosity, or my concern, at that time related to the company's ability to gain a licence from National Patent Development Corporation, which had issued the original license to Bausch & Lomb for the United States market, for the distribution of these lenses outside the United States, and I recall asking Mr. Schuman a number of questions about that and I don't recall at this time Mr. Schuman's responses.

Again, I do recall my general impression, and that is that there was nothing particularly unusual happening with regard to the introduction of the lens outside the United States, either negatively or positively.

I recall asking Mr. Schuman a couple of

questions about the financial markets of the company at that time. I don't recall the specific questions involved, but I do recall my general impression that the company had sufficient cash to finance itself and sufficient assets to finance itself for the foreseeable future.

I don't recall how I structured the questions, nor do I recall his specific answers.

Q Did you have the conversation earlier, in February, with Mr. Allen, concerning the financial position of the company?

A I don't recall any conversation that I had with Mr. Allen about that.

Q With respect to the conversation you had with Mr. Allen on March 1, 1972 --

A I don't recall that.

Q -- did the discussion of the financial position of the company come up during the course of that conversation?

A I don't recall it.

Q Directing your attention now to the March 16th interview, did Mr. Schuman say, at this point in the interview, anything --

THE COURT: No. Sustained. You are leading him. You are going to put words in his mouth.

MR. RUSCH: I am attempting to refresh his recollection, your Honor. He said he didn't recall anything more.

THE COURT: Let him say he doesn't recall anything more and then we will let you refresh his recollection. He has his notes in front of him.

Q Do you recall anything further concerning the financial position of the company?

THE COURT: Fine.

A No. I do recall that there were several off balance sheet assets of the company. One consisted of shares of the common stock of Bendix, which I did ask Mr. Schuman about. I recall that. The other is that I recall asking -- I recall asking -- no, I don't recall asking. I recall knowing that there were some substantial monies represented by the ownership -- by Bausch & Lomb's ownership of warrants for the purchase of National Patent stock, both of which represented significant amounts of money.

Q Can you continue with the interview?

THE COURT: I think this might be a good

time for us to take our mid-afternoon recess.

We will make our recess 15 minutes.

The witness may step down.

(Recess.)

THE COURT: You may proceed.

MR. GREENSPOON: You recall we had discussed the problem we had with the witness Mr. Hoitsma who is going to be out of town. Mr. Hoitsma is here now. I discussed this with counsel on the other side and they offer no objection to our asking the Court if we could take him out of turn. I don't know how long your Honor plans to sit tonight. It is now 3.30 approximately and I would not anticipate that Mr. Hoitsma would take very long either on direct or cross-examination.

THE COURT: I suggest that we proceed immediately with him.

MR. GREENSPOON: Thank you very much.

THE COURT: Mr. MacCallum, if you would step down we will proceed with Mr. Hoitsma.

(Witness temporarily excused.)

MR. GREENSPOON: We would like to invoke the rule with respect to Mr. MacCallum.

THE COURT: You would like him to be excused and wait ouside? He can wait in the jury room if he wishes to the rear of the courtroom here.

MR. LIMAN: My understanding is that

ars

this is being offered not for the truth of what he would assert because he didn't have conversations with Bausch & Lomb but for the state of mind.

MR. GREENSPOON: And the things that he did.

THE COURT: He will tell us what if any acts he performed. He could do that under any circumstances and we will permit it on that basis.

- -

D E R R I K C. H O I T S M A , called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LANG:

Q Mr. Hoitsma, where are you employed?

A Faulkner, ~~Dwight~~ & Sullivan.

Q What is your position there?

A I am executive vice-president and director of the firm.

Q How long have you been with Faulkner, ~~Dwight~~ & Sullivan?

A June of 1960.

Q Were you employed by Faulkner, ~~Dwight~~ Dawkins & Sullivan during March of 1972?

A I was.

Q What was your position during that month at Faulkner, ~~Dwight~~ Dawkins & Sullivan?

A I was director of the firm and manager of the trading department in the firm at that time.

Q Where are they located?

A 1 New York Plaza, 1004, 46th Floor.

Q Is that where they were located on March 16, 1972?

A Yes, sir.

Q Were you at your offices at Faulkner, ~~Dwight~~ Dawkins & Sullivan on March 16, 1972?

A I was.

Q On March 16, 1972 were you aware that David MacCallum was in Rochester, New York interviewing Bausch & Lomb?

A I was.

Q Did you receive a call on that morning from David MacCallum?

A I did.

Q Approximately what time did you receive the call?

A About 11 o'clock a.m.

Q During that conversation what did Mr. MacCallum say to you and what did you say to him?

THE COURT: I just want the record to reflect this is not being received for the truth of the matters asserted.

You may proceed.

THE WITNESS: May I have the question read?

THE COURT: Read the question, Mr. Reporter.

(Question read.)

A He told me that he had talked to the company that morning, that he was in Rochester and he estimated the earnings of the company for the first quarter of whatever the year was -- I can't remember at this point, it is several years ago.

Q 1972?

A 1972 and that we were withdrawing the buy recommendation of the stock. As I recall he said the stock was no longer a buy.

Q Did he say anything else to you?

A He said he was coming back to New York that afternoon and that he would be available for a

sales meeting upon returning.

Q Did you make any notes of the telephone conversation you had?

A I did.

Q I show you Plaintiff's Exhibit 5 for identification and ask you if you recognize that?

A I do.

Q What is that document?

A Those are notes I took when I was speaking with Mr. MacCallum that morning.

Q Those were notes you took while you were on the telephone with Mr. MacCallum?

A Yes.

Q Do those notes refresh your recollection with respect to what Mr. MacCallum told you on the morning --

THE COURT: I don't understand that he needs his recollection refreshed, Counsel. He is doing fine, he didn't say anything about he didn't remember. He even corrected himself and clearly remembered that the statement was made to him "The stock is no longer a buy."

That is my recollection.

Q What if anything other than the fact

that the stock was no longer a buy did Mr. MacCallum say to you during that phone conversation?

A I have no specific recollection of anything else.

Q Do the notes that are Exhibit 3 for identification reflect the notes that you took during the conversation?

A They do.

Q With Mr. MacCallum?

A They do.

Q Do they reflect what Mr. MacCallum said to you during the conversation?

A In reading the notes I see that he had said that the old business was okay, the Soflens was being hurt. Apparently that --

MR. MORRIS: I object to it if he is just reading the notes.

THE COURT: He cannot read the notes, you can tell us whether that refreshes your recollection that something was said to you.

THE WITNESS: No, I already answered that. I recollected what I told you initially, that he was cutting his estimate and the stock was no longer a buy and he was coming back to New York.

I specifically remember nothing else.

Q Were there other things said during the conversation, is that correct?

MR. MORRIS: He said he doesn't remember.

A I guess so.

Q You took those notes during the conversation?

A I took those notes. I do not now specifically recall anything else but what I told you.

Q Those notes reflect what Mr. MacCallum told you during the conversation?

A I am sure they do.

Q The notes do not refresh your recollection independent of what was said by Mr. MacCallum?

A At this point I cannot recall anything but what I told you specifically.

MR.LANG: Your Honor, I would like to read into evidence the notes based on a past recollection recorded.

MR. KAPLAN: May I have a voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. KAPLAN:

Q Do the notes on Plaintiff's Exhibit 5

contain not only things that Mr. MacCallum said to you but your own thoughts and mental processes at the time of the telephone call?

MR. GREENSPOON: I object to that because he said he doesn't recollect and this testimony is simply what Mr. MacCallum told him. He already answered that question.

THE COURT: No, I think there is enough room here that the question can properly be asked.

The objection is overruled. If you understand the question I would appreciate your answering it if you can do so.

THE WITNESS: May I have the question back?

(Question read.)

I certainly had a mental state of mind when he made that call. I asked him to call me. I was worried about the action of the stock at the time. I had in no way made up my mind as to what he was going to say before he called. It would be my recollection that these notes only reflect the thoughts that were passed on to me over the phone at that point. When he spoke later I may have interpreted them.

Q Do those notes contain your interpretation of what he said?

MR. LAND: He already answered that question.

A To the best of my recollection I wrote down exactly what he had said to me on the phone.

Q Did you write it down verbatim, Mr. Hoitsma?

A Obviously not.

MR. KAPLAN: I object, your Honor.

MR. MORRIS: Same objection.

THE COURT: Overruled but I would have the witness specify if he remembered anything, whether he recalls that this was something Mr. MacCallum said in words or in substance or represented his own thought processes.

THE WITNESS: To my recollection these were Mr. MacCallum's -- my notes on his words he said to me on the phone.

Q Could you read the exhibit?

A Starts off "BOL, basic old business good" --

THE COURT: Would it be B and L?

THE WITNESS: BOL, the stock symbol.

THE COURT: All right.

A "Basic old business good. 145 to 175 to $2", and I have no recollection whether that refers to a quarter or to a year other than it is obviously earnings but beyond that I don't know, per share.

"Soflens acceptance hurt by flak, no longer can say moving up on a weekly basis, flat.

"Kit sales declined from late 1971."

MR. KAPLAN: Is the word "from" in there, Mr. Hoitsma?

THE WITNESS: I think so. That is my interpretation of my handwriting.

Declined from late 1971, I believe so. My handwriting bothers me even sometimes.

A (Continuing) "1500 fourth quarter '71; 500, 600 first quarter '72."

Q Mr. Hoitsma, do you know what the 1500 fourth quarter '71 refers to?

A My recollection is kit sales.

Q And do you know what the 5-600 first quarter '72 refers to?

A It must be kit sales also.

THE COURT: Not must be. You have to

tell us, don't speculate. If you don't know tell us. If you do know tell us.

A I already testified I have no specific recollection of this conversation, of the details of this conversation at this point. I have been asked to try and interpret what is here.

Q Go on?

A "Introduced minikit one week ago. Cataract lens restate last year was 27 cents, possibly 30 cents or less than 30 cents. 60-70 cents" and then some times, I guess, as I recall they had to do with Mr. MacCallum's trip back to New York.

Q Read the times, please?

A 2.15 or 2.25 - no, 12-something and 2.30.

Q Do you know whether that refers to the time Mr. MacCallum, 12-something figure refers to the time Mr. MacCallum was to leave Rochester and 2.20 is the time he was expected to arrive in New York?

A I can only surmise at this point. I have no specific recollection.

Q Please don't surmise.

After you got off the phone with Mr. MacCallum, what did you do, if anything?

A I called the salesman over in a loud voice saying I had some information on Bausch & Lomb, on the stock.

They gathered around and I told them quickly that David cut his estimate for the first quarter and that we, the stock was no longer a buy and they should quickly tell their client just that.

And David would be back later in the afternoon for a meeting.

Q Did you tell them what Mr. MacCallum had told you during your phone conversation?

MR. KAPLAN: I object.

MR. MORRIS: I object, that is not binding on the defendants. It is hearsay.

THE COURT: Well, I will take it only as to the state of mind. We have gone this far and we might as well put it all on the record. I don't believe that what he told the salesman can have any effect from the point of view of the truth of the matter asserted.

He made some statements and we will leave it at that.

MR. KAPLAN: Could I have that last question again, your Honor?

THE COURT: Of course.

(Question read.)

MR. KAPLAN: I object. He can ask the witness what he told them.

THE COURT: Yes, sustained.

Q What else did you do after the phone conversation?

A After the phone conversation then I began calling several clients of the firm, some I was responsible for directly and some that one of our salesmen on vacation asked me to call if there was anything important on the company.

Q Did you do anything else?

A After I finished doing that I sold stock that was in certain discretionary accounts I was responsible for.

I don;t know the time sequence of all those various things.

THE COURT: What kind of stock?

THE WITNESS: Common stock.

THE COURT: Of what company?

THE WITNESS: Bausch & Lomb.

Q Did there come a time on March 16 when Mr. MacCallum had a sales meeting at Faulkner, ~~Dwight~~ &

part of my vocabulary, I think, for a long time. But I don't know whether --

THE COURT: To your recollection, did Mr. MacCallum use that word at the time?

THE WITNESS: I have no specific recollection of whether I used it or whether he used it. It is a word I use.

BY MR. MORRIS:

Q And there had been references to adverse publicity about Soflens in several previous publications put out by your firm, had there not?

A I have no recollection of that.

Q You wouldn't deny that if I put them before you?

A I certainly wouldn't.

Q All right. They will speak for themselves.

Mr. Hoitsma, when you got that telephone call from Mr. MacCallum shortly after 11:00 o'clock on the morning of March 16, 1972, is it fair to say that the significant facts that were communicated to you were that David MacCallum had changed his estimate of the stock and no longer considered it a buy?

A Yes.

"Despite the furor in the market yesterday, Faulkner, Dawkins & Sullivan, another leading institutional house, is still optimistic about prospects for Bausch & Lomb."

MR. KAPLAN: Thank you, your Honor.

Q Mr. HOitsma, is it fair to say that as of March 2nd, Faulkner, Dawkins was under a great deal of pressure about its recommendation on Bausch & Lomb?

MR. LANG: Objection.

THE COURT: Sustained.

Q Now, Mr. Hoitsma, I believe you said that you had asked Mr. MacCallum to telephone you when he finished his interview with Bausch & Lomb on March 16th, correct?

MR. LANG: Objection. I don't think that is a correct characterization of Mr. Hoitsma's testimony.

THE COURT: If it is correct, say so. If it is not correct, say so.

A May I have the question again.

THE COURT: You may.

(Question read.)

A Yes.

Q And you did so, Mr. Hoitsma, because you were concerned about the market action in the stock, is that right?

A That is correct.

Q And you were doing so because you were concerned about clients that Faulkner, Dawkins had who had positions in Bausch & Lomb, is that right?

A That is correct.

Q And you wanted to let those clients know anything that developed from Mr. MacCallum's interview as soon as possible, correct?

A That is correct.

Q So Mr. MacCallum's telephone call to you after 11:00 o'clock on March 16th didn't exactly come as a surprise, isn't that right?

A The call, no.

Q Now, in that telephone call, Mr. Hoitsma, Mr. MacCallum, in estimating kit sales on the Soflens, stated that they were his estimates, is that right?

A I have no specific recollection of what he stated.

Q Prior to March 16th, Mr. Hoitsma, did you have any information as to when Bausch & Lomb

jgrf 13 Hoitsma-cross

was going to introduce the aphakic, or cataract lens?

A No.

Q Was that fact of any significance to you whatever?

A Minor.

Q What about the minikits, Mr. Hoitsma? Did you have any information about when they would be supplied prior to March 16th?

A Did I? I don't recall.

Q Was the introduction date of those minikits of any importance to you in recommending purchase or sale of the stock to your clients?

MR. LANG: Objection. He was not personally recommending. He has not testified that he personally recommended the purchase or sale of the stock to any of his clients.

THE COURT: All right. You will have to go back one question, then, Mr. Kaplan. If you wish, you can ask that question first.

MR. KAPLAN: Thank you, your Honor.

Q Mr. Hoitsma, did you have occasion to recommend the purchase or sale of Bausch & Lomb in the first quarter of 1972 to clients of Faulkner, Dawkins?

A Yes.

Q And was the introduction date for the Bausch & Lomb minikits of any importance to you in deciding what recommendation to make to those clients?

A It is very difficult to recall all the specific things that went into the recommendation at this date.

Q Mr. Hoitsma, I believe Mr. MOrris asked you whether you knew, as of March 16th, that sales of the Soflens were no longer increasing. I believe you answer that you did not.

A That is correct.

Q You were examined before the Securities and Exchange Commission in connection with this matter on March 29, 1972, correct? Do you recall that?

A I recall being examined. I don't recall the date.

Q Do you recall being asked the following questions and giving the following answers, page 51:

"Q Have you ever seen anything in print -- when I say 'in print,' published in any form prior to that time -- that the company could not make the statement that sales were going to go up on a weekly basis?

"A Nothing specifically referring to a

company statement. The only thing was in the Wall Street Journal, referring to Smith Barney's article, the assumption of which would be that the publicity was hurting sales. So the obvious conclusion is that sales could not be going up on a weekly basis. But no specific statement by the company, no in print or any other form that I know of."

Do you recall being asked that question and giving that answer?

A No.

MR. KAPLAN: Will counsel stipulate that the questions and answers were propounded and responded to?

MR. GREENSPOON: I will stipulate, your Honor, that these are authentic copies of the transcript of the SEC, that the question was asked and the answer was given. Beyond that, I can't stipulate as to what was in Mr. Hoitsma's mind as to the truth or falsity of the statement when he made it. I assume he will ask him.

MR. KAPLAN: I will ask the question.

Q Mr. Hoitsma, did you tell the truth when you testified before the SEC?

A I certainly did.

Q Now, sir, do you know why Mr. Campbell sold shares of Bausch & Lomb on the afternoon of March 16th, 1972?

MR. LANG: Objection.

THE COURT: Just answer yes or no.

A No.

THE COURT: Thank you.

Q Now, sir, on March 16, 1972 Bausch & Lomb was trading in what range? Do you recall?

A I believe, as I recall, it started the day high at 130 and traded down to like 125 or maybe lower. I am not sure.

Q And as late as the end of February it was in the 170's, is that right?

A I know it was higher. I don't know specifically where.

Q And in 1972 it in fact had gone over 190, isn't that right?

A That I recall.

Q Now, the volume in Bausch & Lomb, Mr. Hoitsma, on the 16th of March, do you recall what it was through the day?

A Specifically?

Q Do you recall that over 100,000 shares

Q In the early part of 1972, prior to March 16th, the Bausch & Lomb stock had dropped from over 190 to a point on the 16th where it was trading from the 130s or lower, and over 100,000 shares had traded by 11:00 o'clock when Mr. MacCallum called you, isn't that the reason that you reacted to his telephone call in the way you did?

A No.

Q What was the reason, sir?

A The information he gave me.

Q Now, the information he gave you, Mr. Hoitsma, was that he had changed his estimate, correct?

A That is correct.

Q He did not tell you that Mr. Schuman had given him an estimate, correct?

A He did not say that, no.

Q Did you ask him how he arrived at his estimate, in that telephone call?

A I did not.

Q The important thing was that MacCallum had changed his estimate.

A That was the important thing.

MR. KAPLAN: No further questions,

ars

MacCallum to the stand.

D A V I D M a c C A L L U M , resumed.

THE COURT: Mr. MacCallum, you understand that you are continuing your testimony this morning under the oath which was administered when you first took the stand.

THE WITNESS: Yes, sir.

THE COURT: Very well.

MR. LANG: May the record reflect that I am placing in front of Mr. MacCallum, your Honor, what has been marked as Plaintiff's Exhibit 3 for identification.

DIRECT EXAMINATION (Continued)

BY MR. RUSCH:

Q We left off yesterday, Mr. MacCallum, with the interview with Mr. Schuman on the morning of March 16, 1972. The subject that we left off at was what Mr. Schuman said concerning the financial position of the company.

If the Court please, I will read the last question and answer posed to Mr. MacCallum.

"Q Do you recall anything further concerning the financial position of the company?

"A No. I do recall that there were several off balance sheet assets of the company. One consisted of shares of the common stock of Bendix, which I did ask Mr. Schuman about. I recall that. The other is that I recall asking -- I recall asking -- no, I don't recall asking. I recall knowing that there were some substantial moneys represented by the ownership -- by Bausch & Lomb's ownership of warrants for the purchase of National Patent stock, both of which represented significant amounts of money."

To the best of your recollection what was the next subject discussed in your interview with Mr. Schuman?

A To the best of my recollection the next topic that we discussed consisted of my beginning to ask a series of questions of Mr. Schuman about the Soflens.

Q Prior to that was there any discussion concerning earnings estimates for the year for the company, excluding Soflens?

A I recall -- I recall asking Mr. Schuman about a specific number for earnings of the company

excluding Soflens, excluding the Soflens division.

However, I do recall that I had established in my own mind a feeling that the company's business excluding Soflens would be up in 1972 but not up dramatically. I had concluded that line of questioning in my own mind with the satisfaction that I thought that I understood the general elements that were going into the company's non-Soflens business.

Q Do you recall whether or not you posed any questions to Mr. Schuman concerning earnings for the traditional lines of Bausch & Lomb?

A I don't recall.

MR. LIMAN: Objection, he was asked this question and answered it.

THE COURT: He answered it again however, and I will let it stand. He says I don't recall.

Q I direct your attention, Mr. MacCallum, to an SEC transcript. Are you the same David MacCallum that appeared before the New York Exchange on March 21, 1972 before attorneys of the SEC?

A Yes.

Q At that time did you testify to the best of your recollection?

A Yes.

Q Did you testify truthfully at that time?

A Yes.

Q Read to yourself page 42, line 17 through page 43, line 17.

A Beginning with line 17?

Q Yes.

THE COURT: While the witness is reading that may we have the last pending question?

(Record read.)

A I have read it.

Q Does that refresh your recollection?

A I don't recall that line of questioning.

Q Were you asked these questions and did you give these answers at that time --

MR. LIMAN: Your Honor, I objected to an effort to impeach a witness. He asked whether or not his recollection is refreshed. The witness says no, he doesn't recall that.

MR. **RUSCH:** This was a statement made by the witness within a week after the occurrence of the activities. I think the Court can well nigh take judicial notice that the witness' recollection at that time was superior to that of today.

THE COURT: The witness said by looking at the material that you presented to him, reading it now, it doesn't refresh his recollection so that I would assume that in some way you wish to present this matter to the Court.

You might tell me under what rule you are doing it. He is a witness. Are you going to impeach your own witness?

He really said he doesn't remember and if he can't refresh his recollection, what are you trying to do and then perhaps I can determine whether you can do it in the manner you are attempting to.

MR. **RUSCH:** I am attempting to introduce it for the substantive purpose of proving that this witness received information concerning earnings for the traditional lines of Bausch & Lomb from Mr. Schuman during the course of the interview.

I believe that the testimony before the SEC is admissible on two grounds, your Honor. Subparagraph 24 under Rule 803 of the Federal Rules of Evidence which requires certain guarantees of trustworthiness.

This witness appeared before the SEC

represented by counsel during the course of an investigation within a week of the events and also as a declaration of interest under Rule 804, your Honor.

MR. LIMAN: Your Honor, we didn't have an opportunity to cross-examine him before the SEC. That is the most blatant type of an example of hearsay and it is clear when you read the transcript that he confused impressions with statements.

One page he says one thing and the other he says another. He wasn't drawing all these sharp distinctions. They asked him his recollection and he has notes in front of him which he made at that time.

THE COURT: Yes, I permitted those to be utilized as past recollection recorded.

MR. MORRIS: He has no recollection from looking at them and I might also point out that this testimony, alleged testimony recorded, is deserving of no more weight than notes because he was not sworn at that time.

THE COURT: Let me say this:

If counsel wishes to ask by reading the

questions which were asked at the SEC hearing and then the answers and ask the witness if he was asked that question and did he make that answer, I will permit that.

To a certain extent I can understand an adverse interest. He was a defendant in the lawsuit.

Overcoming Mr. Liman's initial comment, I would suggest the witness is here now in court and subject to being cross-examined. So that what I am going to do in this case is permit in the first instance counsel to ask the witness -- he has not refreshed his recollection from seeing the transcript. He can ask the witness were you asked these questions and did you make these answers. I suggest that at that point we will see where we are.

MR. RUSCH: Thank you, your Honor.

THE COURT: To the extent I am permitting the inquiry to proceed the objections are overruled.

(Continued on next page.)

jgrf am 2 MacCallum-direct

BY MR. RUSCH:

Q Were you asked these questions and did you give these answers upon the first occasion that you appeared before the SEC, starting line 17:

"A Later in the conversation, immediately prior to entering into a conversation about the Soflens business, I attempted to get some quantitative indication of the extent to which 1972 seemed to be a recovery year. I am -- well, I suggested that if the company had made $1.45 in 1971 from traditional business, which is our estimate in the draft of the memorandum which was sent to Bausch & Lomb on February 24th, I said that if $1.45 is a reasonable estimate of traditional business in 1971, well, excluding the Soflens, would this number $1.75 be surprising to for 1972?

"Q What did he say?

"A He responded to the question that $1.75 is felt comfortable with -- that is, he felt it was comfortable; that although the budgets had not been redone, and I gathered based on the prior comment the budgets were actually being redone, he suspected that the budgets may show a higher projection than $1.75.

"Q Higher?

"A Yes.

"Q Is that right?

"A Yes.

"Q Go ahead.

"A I said, 'Will it be $2.50?'

"Q What did he say?

"A He said at the time that it could be $2 or so, in that area."

Were you asked --

MR. LIMAN: Would you read the next two lines?

MR. RUSCH: Surely.

"Q In that area?

"A Yes. He was attempting at that time to give me some quantitative indication of what I meant by 'excellent recovery for 1971.'"

MR. LIMAN: (Reading)

"Q For 1971.

"A Yes."

THE COURT: What page and line are you on?

MR. RUSCH: We are on page 42, line 17, your Honor, to page 43, line 17.

THE COURT: Have you finished reading?

MR. RUSCH: Yes.

THE COURT: Mr. MacCallum, when you appeared before the SEC, were you asked those questions and did you give those answers?

THE WITNESS: Sir, I don't recall that conversation with the SEC, but it is in the testimony and I have no choice but to say I must have said those things.

THE COURT: Well, I don't know --

MR. LIMAN: I move to strike that.

THE COURT: Yes. I don't know that I can permit any speculation or guesswork.

I would ask you at this point to search your recollection and to tell me if you can answer the question yes, no or you don't recall.

THE WITNESS: I recall a conversation -- I recall a -- I recall -- at the company I do recall an attempt on my part, I don't know whether it was in a direct conversation with Mr. Schuman or an attempt to mentally quantify what I was thinking at the time, to come to grips with the question of how much the company's non-Soflens business was going to make in 1972. I do recall that effort that I was making

at that time and beyond that I don't recall either direct conversations with Mr. Schuman, nor do I recall the conversation with the SEC which was just read to me.

THE COURT: Although you don't have a clear recollection of the detailed conversation, do you remember it in sufficient general outline to tell me whether or not Mr. Schuman mentioned any figures, any numbers, whatever they might have been?

THE WITNESS: No, I do not recall that.

MR. RUSCH: Your Honor, the SEC transcripts have been stipulated to between the parties as being authentic and purporting to represent statements of the witness at the time, at the date of the transcript. And at this time we would like to offer that passage that I just read into evidence.

MR. LIMAN: Your Honor, I object again. If you would even read this, this passage, you would see that the witness is talking about what he gathered. He then talks about the fact that he, Schuman, "was attempting at the time to give me some quantification of what I," meaning the witness, "meant by 'an excellent recovery for 1971,'" the past year, and the whole thing, your Honor, doesn't seem to me to make

very much sense when you even read it, talking about '72 and here it is '71.

And that is what the danger is when there isn't a lawyer there to ask questions. And so you do get the witness' impressions, which is his job, to deal in impressions, confused with what is said, and I object to this.

MR. RUSCH: Your Honor, perhaps if I read another passage from the transcript it would help refresh his recollection.

THE COURT: I am overruling the objection. I am receiving the transcript, but I will tell the Commission that I place much more credence in the live testimony of the witness here today. And I would suggest at the moment, in view of his responses, it is a matter of weight.

I am going to take this because I believe it to be authentic. But whatever his motives may have been at the time, I consider his testimony now as primary. He is here and he is subject to being cross examined. So I am going to take it, but I would assure the Commission that I will give it relatively little weight when I come to make my findings.

MR. MORRIS: Note the Company's objection.

THE COURT: The objections of the defendants are noted.

BY MR. RUSCH:

Q I want to direct your attention to Plaintiff's Exhibit 3 for identification in front of you, page 6 in particular, the three lines beginning, "1975."

Would you please read that to yourself and see if that refreshes your recollection as to what was said concerning earnings for the traditional lines of Bausch & Lomb by Mr. Schuman?

A I'm sorry. I have looked at this. I have looked at it a number of times. It does not refresh my memory, nor does it necessarily have to represent notes on a conversation with Mr. Schuman, which I think is what you said.

Q I am merely asking if that refreshes your recollection, Mr. MacCallum. Does it or does it not?

A No, it does not. This could very well represent the --

Q Mr. MacCallum, you answered the question.

THE COURT: You answered the question, sir. Thank you.

Q Did you make these notes, these three

lines, during the course of your interview with Mr. Schuman?

A Yes.

Q Does anything in those three lines represent something that Mr. Schuman said to you or acknowledged to you?

MR. LIMAN: Objection to the words, "or acknowledged to you."

Q Does anything in those three lines represent something Mr. Schuman said to you?

A I don't recall.

Q Do you deny that anything in those three lines was something that Schuman did not say to you?

MR. LIMAN: Objection to that question.

MR. MORRIS: Objection.

THE COURT: Sustained. Argumentative.

Q Is there anything in those three lines which Mr. Schuman acknowledged to you?

MR. LIMAN: Objection to the form of that question.

MR. MORRIS: He already answered that question.

THE COURT: Yes. I think the word "said" covers it, 'said,' 'stated', 'spoke'.

MR. RUSCH: No, your Honor. I think in --

THE COURT: Don't characterize it by "acknowledged" or "admitted." I won't take that in the way of questions. If he said it, I want to know it. If he spoke the words, I want to know it.

THE WITNESS: Sir, I don't recall him speaking the words. I don't recall him speaking the words.

THE COURT: Well, did you say something and then he nodded his head? Did that happen?

THE WITNESS: I don't recall that. And -- no, I don't recall that.

BY MR. RUSCH:

Q Did you ask Mr. Schuman, on the morning of March 16th, during the course of the interview, "Mr. Schuman, if the company earned $1.34 in 1971 for the traditional lines of Soflens, is it fair or safe to assume that the company earned $1.75?"?

MR. LIMAN: I object on the grounds of repetition.

THE COURT: Overruled. Yes, it is to a certain extent. But I am going to permit it.

A I don't recall that. I don't recall saying that. I don't recall asking that question.

Q Did you ask Mr. Schuman whether the company estimated for the traditional lines of Bausch & Lomb for the year 1972 that it would earn $2.50?

A I don't recall that.

Q Did Mr. Schuman say to you that the company would not earn $2.50 for its traditional lines in 1972?

A I don't recall that.

Q Did Mr. Schuman say to you that the company could earn $2 for the traditional lines in 1972?

A Nor do I recall that.

Q Did you ask Mr. Schuman whether the company could earn $2 for 1972 in the traditional lines?

A I don't recall that.

Q Was there any discussion concerning Soflens sales during the course of the interview with Mr. Schuman?

A Soflens sales?

(Pause.)

By Soflens sales do you mean kit sales, consumer kits? What do you mean?

Q Let me withdraw the question.

Did Mr. Schuman say anything concerning the aphakic lens during the course of the interview?

A I recall asking Mr. Schuman about the aphakic lens in the automobile en route to Rochester.

Q Is there anything else that you can recall about the interview --

THE COURT: Wait a minute. I want to follow this.

What did you say to him and what did he say to you?

THE WITNESS: I believe I asked Mr. Schuman whether or not the aphakic lens had been introduced as yet.

Q And what did Mr. Schuman say?

A And Mr. Schuman indicated to me that the aphakic lens had not been introduced as yet.

THE COURT: Did he give you any further information about the aphakic lens?

THE WITNESS: I don't believe so. The question of the aphakic lens in my mind at that time was irrelevant.

MR. RUSCH: I move that the last question be stricken.

THE COURT: Strike it. It is not

responsive.

Q Did Mr. Schuman say anything about the delay in Soflens shipments?

A I recall asking Mr. Schuman whether or not the company had resumed shipment of the Soflens following the sterility problems with the shipping vials. Mr. Schuman indicated to me that the Soflens shipments had resumed.

Q Did he say when?

A I believe he did say when. I don't recall the date at this time, though.

Q Was it within the past week of the date of the interview that you had with Mr. Schuman?

A I believe it was relatively recent. I believe it was recent, relative to the date of the interview.

Q Within days?

A Within a matter of days, yes.

Q And did there come a time when the interview continued in an automobile ride?

A Yes.

MR. LIMAN: Sorry, your Honor. He just testified that the discussion about the aphakics took place in the automobile ride.

THE COURT: Yes.

Q Had you asked Mr. Schuman for a ride to downtown Rochester?

A Yes.

Q Could you please describe for the Court what was said by Mr. Schuman during the course of the automobile ride?

THE COURT: Let me go back. I would like to find out something from you.

About how long did this automobile ride take from the plant to downtown Rochester?

THE WITNESS: My recollection is that it was very brief, on the order of five minutes or so.

MR. RUSCH: I believe that has been stipulated to, your Honor.

THE COURT: All right.

Now, would you tell us, if you would, the conversation that took place during the course of the automobile ride from the plant to downtown Rochester?

THE WITNESS: I don't recall the nature of my -- I don't recall my specific questions, nor do I recall Mr. Schuman's specific answers. I do recall the line of questioning that I was interested in at

that time.

The question -- the topic of the questions was the momentum of shipment of kits to the trade during the first quarter of 1972.

Q And what did he say concerning that?

THE COURT: Are you speaking of minikits?

THE WITNESS: No, sir.

THE COURT: All right.

A I believe I suggested a number of kits sold in the fourth quarter of 1971 which I deduced from a series of sources, most importantly the company's statements to the Wall Street Journal, and I then suggested a number of kits which I had presumed would be likely to be sold in the first quarter of 1972, and my general recollection at this time is that Mr. Schuman did not dissuade me in any significant way from that estimate.

THE COURT: Well, did he say something? Did he say, "You are a pretty smart fellow," or "You are way off target," or anything?

THE WITNESS: I don't recall his words, but my general recollection --

THE COURT: The substance of it.

THE WITNESS: My general recollection of

it is that my estimates were approximately correct.

MR. LIMAN: Is that his impression of what his words were?

THE COURT: That's right.

I want to know from you if he said, "Your estimates are substantially correct," or if that is the substance of what he said.

THE WITNESS: Yes, sir, that is the substance of what he said: "Your estimates are essentially correct."

Q Do you recall what number you conveyed to Mr. Schuman for the first quarter of 1972?

A My recollection is that the number was something in the order of 800 kits.

Q I now show you a document dated March 17, 1972, which is a day after the event, after your interview with Mr. Schuman. Do you recall appearing before officers of the New York Stock Exchange?

A Yes.

Q Did you attempt to testify truthfully at that time?

A Yes.

Q To your best recollection?

A Yes.

Q I direct your attention to the middle of page 10, beginning of that paragraph. Would you read the paragraph to yourself and continuing on to page 11.

(Pause.)

Does that refresh your recollection as to what you said to Mr. Schuman and what he said to you concerning the shipment of kits in the first quarter 1972?

A Now that I see the testimony, the number that I used of 800 apparently was not the number that I threw at Mr. Schuman.

Q Do you recollect the number?

A My recollection at this time is that the number of kit sales in the first quarter of 1972 I had deduced was going to be down very significantly from the fourth quarter of 1971, and that is what I recall.

Without recalling the quantification of it, I do recall in my mind the line of questioning of a very significantly lower number.

Q And did Mr. Schuman confirm that significantly lower number?

MR. LIMAN: Objection to the form of

the question.

THE COURT: Yes.

What did he say? And I think it has already been testified to, but I will allow it.

THE WITNESS: I think he indicated to me that it was a reasonably good estimate.

MR. LIMAN: I would move to strike the words 'he indicated." If he said it, let this witness say it. If he gained an impression from the words that Mr. Schuman used, then let him say that, your Honor. But I don't think --

THE COURT: Let's try to find out, yes. I need something that I can call probative at this point.

As I understand your testimony, you suggested, my research indicates, the number of kits sold during the fourth quarter of 1971, is that correct?'

THE WITNESS: Yes, sir.

THE COURT: Then you went on and you made an estimate to him of the number of kits you thought would be sold in the first quarter of 1972, is that correct?

THE WITNESS: Yes.

THE COURT: And after you did that, what, if anything, did he say?

THE WITNESS: Mr. Schuman said in words to this effect: That the estimate which I had arrived at as to the number of kits sold in the first quarter of 1972 was a good estimate.

BY MR. RUSCH:

Q Did Mr. Schuman say anything concerning fittings of Soflens for the first quarter of 1972?

A I don't recall.

Q Directing your attention to Plaintiff's Exhibit 3 for identification in front of you, I direct your attention to the last page. Does that refresh your recollection?

MR. MORRIS: The last page of what?

MR. RUSCH: Plaintiff's Exhibit 3.

A I don't recall whether this represents my estimates, since these notes were not made contemporaneous with the conversation with Mr. Schuman in the car.

Q Does that refresh your recollection as to what Mr. Schuman said, if anything, concerning fittings for the first quarter 1972?

A No.

Q I direct your attention to page 135 and 136 of the SEC transcript dated March 21, 1972 begining at line 24, page 135 and continuing through line 4 of page 136.

Does that refresh your recollection as to what, if anything, Mr. Schuman said?

A What line?

Q 24, page 135 through line 4, page 136.

Have you read those lines, Mr. MacCallum?

A Yes, sir.

Q Does that refresh your recollection as to what Mr. Schuman said?

A I recall -- yes, I recall asking Mr. Schuman whether or not the contamination problems which had arisen over a period of weeks --

MR. LIMAN: Will you look at 118 also?

MR. RUSCH: I object to that.

THE COURT: Yes, that was not appropriate at this time. I think the witness is being interrupted.

Mr. Reporter, would you read his answer to this point and then we will continue with his answer.

(Answer read.)

A -- prior to my conversation with Mr. Schuman, whether or not these contamination problems had affected the consumer acceptance of the lens.

I do recall attempting to get some idea of the sales curve in terms of consumer fits of the lens. I don't recall the quantification of it.

THE COURT: What did Mr. Schuman say if anything when you asked him whether the contamination problems had affected consumer response?

THE WITNESS: I do recall that Mr. Schuman said to me in words to the effect that contamination problems had hurt the acceptance of the lens.

THE COURT: Did he say anything else?

THE WITNESS: I don't recall his specific words of what he said. I don't recall either the specific words or any other substantial important fact that was conveyed at that time.

Q I direct your attention to page 11 of

your testimony before the New York Stock Exchange, once again given one day after the events, March 17, 1972 --

MR. MORRIS: I object, your Honor, to counsel --

MR. RUSCH: I haven't finished my question.

MR. MORRIS: I object to his continued reference to this as testimony. This is an unsworn interview.

THE COURT: Very well. I will accept that characterization.

MR. RUSCH: Also it is a statement made by Mr. MacCallum, your Honor, during the course of this interview as Mr. Morris puts it and it was explained pursuant to a warning to this witness that in the instance of any material misrepresentations to any of the New York Stock Exchange employees Mr. MacCallum's license, registration as an allied member of the New York Stock Exchange would either be suspended or revoked.

THE COURT: In any event he made a statement.

MR. RUSCH: Yes.

THE COURT: You wish me to refer to which page?

MR. RUSCH: Page 11.

THE COURT: And now you are referring him to it.

Q The paragraph beginning of the middle of the page:

"I then asked the next question."

THE COURT: Please read that to yourself.

Q Including the full paragraph continuing on to page 12.

A I read it.

Q Does that refresh your recollection as to what Mr. Schuman said concerning fittings for the first quarter 1972?

A It does not. In specific detailed, quantified detail?

Q In any detail.

A It does. As I indicated, I do recall attempting to get a fix on the sales curve of the Soflens. I myself had some very well founded, in my opinion well grounded thoughts on what the sales curve of Soflens was and I do recall attempting to verify that curve.

THE COURT: What did you say to him in substance and what did he say in response?

THE WITNESS: I do remember asking Mr. Schuman whether or not the contamination problems had hurt the sales of the lens and I do remember his response to be yes. I don't recall the quantification of it.

THE COURT: Do you recall whether or not there were figures. There was quantification mentioned even though you do not recall the specific figures today?

MR. LIMAN: Mentioned by my client, Mr. Schuman?

THE COURT: By Mr. Schuman. Do you recall him saying anything, giving you numbers?

THE WITNESS: No.

THE COURT: Estimated numbers, approximate numbers?

THE WITNESS: No, sir.

Q Did you give this statement to the four employees of the New York Stock Exchange on March 17, 1972 --

MR. LIMAN: I object to this. I think this is improper. This witness has given testimony

on four occasions. Each time he tells the story differently and I don't think this is a proper invocation of the Federal Rule. This isn't a hostile witness.

THE COURT: I am prepared to declare him so. He is now declared a hostile witness by the Court, having heard his responses over the recent period of time.

I take note of the fact that he was named as a defendant in this action -- he is no longer a defendant. I have heard his responses and in the context of this case I now declare him to be a hostile witness.

He may be led and other action may be taken consistent with him being a hostile witness.

Q Did you give this statement to officers of the New York Stock Exchange on March 17, 1972 --

A Yes.

Q Let me read it to you.

"Then I asked the next question which related to consumer acceptance of the lens. Our organization had attempted to develop a good feel as we can develop for the consumer acceptance of the lens. As a matter of

fact we spent close to $2000 in the middle of January on a consumer survey of the Soflens done for us by a nationally based marketing research organization and I said, 'Assuming, Mr. Schuman, that you sold that 10,000 pairs of Soflens with fittings to the consumers in the fourth quarter of 1971, assuming that to be correct, is it conceivable or is it appropriate to believe that your sales of the Soflens in the first quarter of 1972 are something in the area of 15, maybe 18,000?'

"That is approximately the way I phrased the question. He said that is a good ball park number. And then he said that we have been affected by the contamination flak. He furthermore said that prior to his going on vacation he was able to make the statement that each week Soflens sales exceeded the week previous and he continued that having reviewed the data for the last two or three weeks, was no longer able to make that statement. That in fact Soflens sales flattened he believes again because of the con-

tamination flak and all of the other problems."

Did you make that statement to the New York Stock Exchange on March 17, 1972?

A Yes.

Q Anything else that you can recall concerning the interview with Mr. Schuman on the morning of March 16?

MR. LIMAN: Still talking about the five-minute car ride?

THE COURT: I regard the question as being the entire interview. Let us make that quite clear.

MR. RUSCH: Yes, sir.

THE COURT: The entire time from the beginning of the meeting until the end excluding the interruptions.

MR. RUSCH: Let me rephrase the question if I may.

I withdraw the question, your Honor.

Q What happened next after the interview?

A After the interview I walked to a telephone booth in downtown Rochester and placed a telephone call to New York City.

Q About what time was this?

A Approximately -- shortly after 11 o'clock.

Q This was immediately after leaving Mr. Schuman's presence?

A Yes.

Q Continue, please?

A I called New York City. I called the office of Faulkner, Dwight & Sullivan and spoke with Derrik Hoitsma who at that time was our head trader.

Q What did you say to Mr. Hoitsma?

A I said that I was in Rochester, New York; that I had completed an interview with the company.

That I was going to be reducing the earnings estimate on Bausch & Lomb I believe from 90 cents per share for the first quarter of 1972 down to 60 to 70 cents per share for the first quarter of 1972.

Furthermore, I was going to be reducing the estimate for the year from $6 per share down to $4 per share and I was going to be withdrawing the buy recommendation.

I told him that I was going to take a plane back to New York as quickly as possible and I would see him in the offices later on that day.

Q What else did you say to him if anything?

A I don't recall anything else that I said to him.

THE COURT: One moment, will you read back that last answer.

(Answer read.)

Q Did you say anything to Mr. Hoitsma during this phone conversation concerning kit sales for the first quarter?

A I don't recall.

Q Did you say anything to Mr. Hoitsma concerning fittings for the first quarter 1972?

A I don't recall.

Q Isn't it a fact that you indicated to Mr. Hoitsma during the phone conversation that kit sales had flattened?

MR. LIMAN: Objection both on the ground of form and on the ground that his conversation with Mr. Hoitsma is hearsay.

He indicated what he said and I don't see why we have to get in anything else.

THE COURT: I would sustain the objection on the ground of form. I am taking the conversation not for the truth of the matter asserted so that

the hearsay objection is bypassed in that regard.

Q Did you say that yourself that the stock was going to be down to Mr. Hoitsma?

A I don't recall that.

Q Did you say anything to Mr. Hoitsma about a sales meeting for later that day?

MR. LIMAN: Objection on the ground of relevancy. We know a sales meeting did take place that day.

MR. RUSCH: I am asking the witness if he said it.

THE COURT: Don't argue between yourselves.

Overruled.

MR. RUSCH: I beg your pardon, your Honor, for the outburst.

THE COURT: No problem.

Overruled.

A Yes, I believe I do recall saying to Mr. Hoitsma that there would be a sales meeting later on in the day about this.

Q Is there anything else you can recall about the Hoitsma conversation?

A No.

Q Was this the first occasion that you ever called in a change in a recommendation, investment recommendation?

MR. LIMAN: Objection again, your Honor. I really don't see the relevance of it.

MR. RUSCH: To show the materiality of the information.

THE COURT: I will allow it. Really I don't see that. I wouldn't care if it was the first one or the hundredth time frankly. He thought he wanted to pass on this information, he passed it on for what it was worth.

THE WITNESS: Yes, it was.

THE COURT: The first call you made. You interviewed Mr. Schuman before, had you not?

THE WITNESS: Yes, sir.

THE COURT: In Rochester?

THE WITNESS: Yes, sir.

THE COURT: How many times?

THE WITNESS: Twice in Rochester and on the telephone a number of other times.

THE COURT: Going to the two meetings in Rochester, on one or both of those occasions, did you

call your office from Rochester following your meeting with Mr. Schuman?

THE WITNESS: No, sir.

THE COURT: Just returned to your office, period?

THE WITNESS: Yes, sir.

BY MR. RUSCH:

Q What did you do next after the Hoitsma phone conversation?

A After lunch in the Rochester Airport I boarded a plane for New York City and arrived back in New York City approximately 2 o'clock.

Q During the course of the plane ride did you do anything concerning Bausch & Lomb?

A I prepared a draft of a memorandum on Bausch & Lomb during that plane ride.

Q I now show you what has been marked as Plaintiff's Exhibit 27.

Is that the draft you prepared during the course of the plane ride?

A Yes, I believe it is.

Q Will you please read for the Court's benefit the first line on the first page under the paragraph headed "Preliminary Summary"?

MR. LIMAN: Is this in evidence?

THE COURT: I was of the impression that it was.

MR. GREENSPOON: It is not, your Honor. Defendants have objected to this one.

THE COURT: Then it would be inappropriate for him to read it.

MR. GREENSPOON: I would ask that it be offered in.

THE COURT: This is the memorandum written on the plane. I would think that comes within the past recollection recorded.

MR. LIMAN: Could I ask him a question?

THE COURT: You certainly can.

VOIR DIRE EXAMINATION

BY MR. LIMAN:

Q Mr. MacCallum, does this represent your conclusions concerning Bausch & Lomb stock?

A Yes.

Q Does it quote or attribute anything to Mr. Schuman?

MR. GREENSPOON: I object to the part beyond quote.

Q Does it quote Mr. Schuman?

A No.

Q Does it paraphrase what Mr. Schuman said to you?

MR. RUSCH: I object to the form of that question.

THE COURT: Sustained as to form.

Q Did you attempt to in this report convey the substance of what Mr. Schuman said to you?

MR. GREENSPOON: I object to that, your Honor, on the grounds that he can ask what it was he said In there.

THE COURT: I will allow it.

MR. LIMAN: This is offered as past recollection recorded.

THE COURT: I will permit it on voir dire.

Q Was this a report of your conversation with Mr. Schuman?

A No.

Q Was this a draft of your own research report?

THE WITNESS: That is correct.

MR. LIMAN: Your Honor, this can't come in as past recollection recorded of a conversation with Mr. Schuman.

THE COURT: Does any portion of this several-page memorandum contain a summary or statement of what Mr. Schuman told you and, if so, what portion?

THE WITNESS: May I read it?

THE COURT: Of course.

THE WITNESS: I read the memorandum, your Honor.

What is the question?

THE COURT: Will you read the question, Mr. Reporter.

(Question read.)

THE WITNESS: None of it represents anything Mr. Schuman told me.

BY MR. LANG:

Q This document marked as Plaintiff's Exhibit 27, did anything related by Mr. Schuman during the course of the interview earlier that day, that same day, influence whatever it was that is represented in this Plaintiff's Exhibit 27?

MR. LIMAN: I object to that, your Honor.

MR. GREENSPOON: That is a fair question, your Honor.

THE COURT: Well, talking about his state of mind?

MR. RUSCH: Yes.

THE COURT: I am going to do it for a very limited purpose. I take it for his state of mind and I am not even sure what his state of mind is worth in the context of this case but I will listen to it.

Overruled.

MR. LANG: We are attempting to show to this witness --

MR. LIMAN: We don't need a speech, the objection was overruled.

THE COURT: I have overruled the objection and I will take it; just going to the sate of mind and I am not sure frankly, and I want the record to reflect this, that his state of mind is particularly helpful to the Court in the context of this case but I will take it and I will consider it.

MR. RUSCH: Thank you, your Honor.

Q Would you now please read the first sentence?

THE COURT: What is the question?

(Record read.)

A My answer is no.

Q What did you do next?

A Next I returned to the offices of Faulkner, Dwight & Sullivan.

Q Approximately what time?

A From the airport, approximately shortly after 2 o'clock.

I engaged in a conversation with Mr. Faulkner who at that time was the managing partner of the firm and I said to Mr. Faulkner that I felt it was proper that we withdraw the buy recommendation of Bausch & Lomb and that we reduce the earnings estimate for both the first quarter and for the year and that we have a sales meeting about this later on in the afternoon.

Q Did you say anything to Mr. Faulkner concerning kits?

A I don't recall a conversation with him about kits.

Q Didn't you say to Mr. Faulkner that the kit sales and lens fittings were not doing as well as you had thought?

MR. MORRIS: I object to what he said to Mr. Faulkner.

THE COURT: That is not being offered for the truth of the matter asserted.

MR. RUSCH: That is correct, your Honor.

THE COURT: Overruled under those circumstances.

A I don't recall anything.

Q What did you say next?

A My conversation with Mr. Faulkner was interrupted by my secretary who told me Mr. Schuman was on the telephone and I returned to my office and took a telephone call from Mr. Schuman.

Mr. Schuman asked me words to the effect that he understood that we had withdrawn the buy recommendation on the stock and that I was using an earnings estimate of 60 to 70 cents a share and asked me what about that.

And I said that is essentially correct, we had indeed withdrawn the buy recommendation and were using an earnings estimate of 60-70 cents per share for the first quarter.

He said to me again in words to the effect that I was mistaken. That if that was the impression I gained from the interview in Rochester, that I was mistaken. That earnings would be con-

siderably higher than that for the first quarter of the year.

Q Did he say to you 70 or 80 cents?

A I don't recall the words, if he used words 70 to 80 cents or --

MR. LIMAN: We have stipulated.

THE COURT: I was about to say if there is nothing further here that isn't stipulated, I don't know if it is helpful to go over it because we got it and I accept it as a stipulated fact.

Go ahead.

Q One more item in this conversation:

Did you suggest to Mr. Schuman that he meet with security analysts in New York?

A Yes, I suggested that there was -- I don't recall if I used the phrase security analysts but I did indicate to Mr. Schuman that in my opinion the company was being buffeted by a great deal of problems recently, particularly relating to the contamination rumors on the lens and that the company attempt to meet these problems head-on as quickly as possible.

I believe I suggested to Mr. Schuman that if it would be at all convenient for the company and

ars

for him, that Faulkner, Dwight & Sullivan would sponsor such a meeting.

Q After this phone call did you next have a phone conversation --

THE COURT: I think before we get into another subject we should recess. It is approximately 10 minutes of 11 and we are convening a three-judge court here at 11 o'clock.

I would ask counsel to wait to find out the requested time for the three-judge court and then add 45 minutes to what is requested and return ready to proceed. That instruction goes for counsel, witness and the court reporter.

(Recess.)

AFTERNOON SESSION

12:45 p.m.

D A V I D M A C C A L L U M, resumed the stand and testified further as follows:

MR. RUSCH: May we continue, your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. RUSCH (Continued):

Q Mr. MacCallum, you may recall that we were at that point in your testimony immediately after the first phone call from Mr. Schuman on March 16, 1972.

Did you not then have a conversation with Mr. Sheldon Greenberg of IDS immediately after the Schuman conversation?

A No. After the first telephone call from Mr. Schuman, I was then, I believe, alone in my office for approximately 20 or 30 minutes, really mulling over in my mind whether or not I had made some fundamental mistake in terms of my analysis of the company.

Q Just listen to the question and respond to the question to the best of your recollection.

MR. LIMAN: He answered the question, your Honor.

THE COURT: I am letting the answer stand. You may proceed.

Q Did you have a phone conversation with Mr. Sheldon Greenberg?

A You said, "immediately after the conversation with Mr. Schuman"?

Q Yes.

A No.

Q Shortly after.

A Approximately --

MR. LIMAN: Objection, your Honor. That calls for a characterization. He said that about a half hour or 25 minutes after the conversation he was still mulling it over. That brings us almost to 3:00.

THE COURT: All right. Let's find out what he in fact did.

According to the stipulation, so I can orient where I am in point of time, the parties have stipulated, Mr. MacCallum, that you received a telephone call from Mr. Schuman at about 2:24 p.m. on March 16th.

How long was that telephone call in duration?

THE WITNESS: Sir, was that the first telephone call from Mr. Schuman?

THE COURT: Yes. That is what I understand.

MR. MORRIS: That is correct, your Honor.

THE WITNESS: My recollection is that that telephone call lasted for approximately five minutes.

THE COURT: Well, that gets us to approximately 2:30 p.m. on March 16, 1972.

Would you tell us what, if anything, you did following your concluding that first telephone call with Mr. Schuman?

THE WITNESS: Following that telephone call with Mr. Schuman, I sat in my office, as I recall, alone in my office, for approximately 25 to 30 minutes or so mulling over in my mind whether or not I had made any fundamental mistake in my analysis of the company, largely attempting to come to grips with the problem which Mr. Schuman raised, which was the inference that my earnings estimate was quite low.

THE COURT: In that period of time, who,

if anyone, did you speak with?

THE WITNESS: I don't recall if I spoke to anybody during that period of time.

THE COURT: What happened at the end of that period of 20 or 30 minutes, if anything?

THE WITNESS: I was asked to take a call -- I was asked to speak with Investors Diversified Services, with the analyst at IDS, whose name is Sheldon Greenberg.

THE COURT: Did Mr. Greenberg call in or did you or your switchboard call out?

THE WITNESS: I believe that the salesman responsible for the account, whose name is Howard Wille, placed a call to Mr. Greenberg and then Mr. Wille asked me to speak directly with Mr. Greenberg.

I had resisted speaking to anyone about this until the sales meeting. I wanted to say my piece to everyone simultaneously. But Mr. Wille persuaded me that Mr. Greenberg was on the telephone and would I speak to him briefly, and I consented to do that.

BY MR. RUSCH:

Q And what did Mr. Greenberg say to you and what did you say to him?

A I said to Mr. Greenberg that we were going to be removing the buy recommendation on Bausch & Lomb, that I had reduced my earnings estimate for the first quarter to 60 cents per share -- I may have said 60 to 70 cents per share, but I believe I did use the number 60 cents per share -- and I believe I indicated -- I said to him that my earnings estimate for the year was going to be reduced as well from $6 down to $4 per share.

Q And didn't you say that Soflens sales had lost its momentum?

A I don't recall saying that.

Q And during the course of the conversation the phone call was interrupted by an indication that Mr. Schuman was on another line?

A Yes. The call was interrupted -- the call to Mr. Greenberg was interrupted by a telephone call from Mr. Schuman, and I asked Mr. Greenberg if I could be excused for a brief period of time to take the call from Mr. Schuman.

Q And it has been stipulated to that you took the call from Mr. Schuman and he informed you that he was correcting the 70 to 80 cent figure to a 65 to 75 cent figure.

And then did you get back on the phone conversation with Mr. Greenberg?

A I'm sorry. I didn't understand what you said.

THE COURT: Let me have the reporter read it back.

(Record read.)

MR. LIMAN: Excuse me, your Honor. So that the witness understands, it has been stipulated between Bausch & Lomb and Mr. Schuman and the SEC. That is what the reference was.

THE COURT: That is correct. In other words, the parties have agreed to the substance of the conversation between Mr. Schuman and yourself. So that is not before me at the moment.

But, as I hear the question now, after you finished speaking with Mr. Schuman the second time, did you resume speaking with Mr. Greenberg of IDS?

THE WITNESS: Yes.

Q And what did you say to Mr. Greenberg?

A I said to Mr. Greenberg that Mr. Schuman had essentially substantiated the fact that my estimate was on the right track.

Q Your estimate of first quarter earnings for Bausch & Lomb?

A Yes.

Q Thereafter you had a sales meeting with the salesmen of Faulkner, Dawkins & Sullivan, isn't that correct?

A Yes.

Q And that meeting took place prior to the close of the New York Stock Exchange?

A The meeting started prior to the close of the New York Stock Exchange.

Q It started 3:00 o'clock, approximately. I believe it started right after 3:00 o'clock.

Q And at the outset of the meeting you indicated that you had been with management of Bausch & Lomb that morning?

A Yes.

Q And you then said that you were lowering your first quarter earnings estimate to 65 cents?

A I believe I said 60 to 70 cents and using 65 cents as a mid point, yes.

Q And you informed the salesmen at that meeting thatSoflens sales had lost its momentum?

A I don't recall that.

Q Did you indicate at the meeting that Soflens sales were flat?

A I don't recall that. Did you -- I don't recall that.

Q Did you indicate at the meeting that the week to week Soflens sales rate had flattened?

A I don't recall that.

Q I direct your attention to your testimony before the SEC.

In this instance, your Honor, on June 12, 1972.

Did you testify at that time to the best of your recollection?

MR. LIMAN: Your Honor, I object on grounds of relevance. Mr. Schuman has testified that he told him as well as other analysts that the sales rate had flattened over the past few weeks.

Is there any real relevance as to whether that particular fact was repeated by him at a meeting that began at 3:00?

MR. RUSCH: Yes, there is, your Honor.

THE COURT: They think it is. I am going to let him put it in.

Q I direct your attention to page 251.

Did you testify truthfully on that occasion when you appeared before the SEC?

A Yes.

Q And to the best of your recollection?

A Yes.

Q Would you please look at page 251, line 24 to page 252, line 13.

(Pause.)

Does that refresh your recollection?

A I don't recall saying that, no.

Q Did you, on the occasion of appearing before the SEC on June 12, 1972, give the following response to the following question, on page 251, beginning line 24.

"Q Did you inform the salesmen of the fact that Mr. Schuman indicated to you that sales were flat" --

And there was some colloquy, your Honor, between counsel.

"Q (Continuing) -- for the Soflens?

"A That sales were flat for the Soflens?

"Q Yes.

"A I believe I did indicate that to the sales people. I had also indicated this to Mr. Faulkner

and repeated it to the sales group, that is, that Mr. Schuman indicated to me that the sales trend in the Soflens was not evidencing the same week by week progress which it had been evidencing somewhat early in the year."

Were you asked those questions and did you give those answer?

A I don't recall being asked the questions nor giving the answers. But that was my testimony, so it must be correct.

MR. RUSCH: Your Honor, we offer that statement into evidence under sub-paragraph 24 of Rule 803.

MR. MORRIS: It is not sworn testimony.

MR. LIMAN: I object to it whether it is sworn or not on the ground that -- is he offering it for this witness' state of mind?

MR. RUSCH: Yes, I am, your Honor.

THE COURT: If it is just for the state of mind of the witness, I am going to allow it. Obviously, I must. If it were being offered for the truth of the matter asserted, I would not.

MR. RUSCH: Just for the state of mind of this particular witness, your Honor, on that

occasion, at that time.

THE COURT: I'm not sure I completely see the relevance and materiality of this witness' state of mind. I am obviously much more interested in the information or lack of information which was conveyed to him by Mr. Schuman during the occasion of the face-to-face visit on the 16th in the morning and the two telephone calls in the afternoon.

But for the limited purpose of the offer I am going to accept the proof and let you point out to me where and how it is relevant and material to the issues before me.

MR. KUSCH: Thank you, your Honor.

Q Isn't it true that on a previous occasion Mr. Schuman had given you a quarterly earnings estimate prior to March 16, 1972?

MR. LIMAN: Objection to that question.

THE COURT: Overruled. It goes to intent.

MR. MORRIS: If the Court please, that is totally outside the pleadings in this action.

THE COURT: It may well be. But if it turns out to have been a prior similar act, I am going to consider it in connection with intent.

A What was the question?

MR. RUSCH: May we have the reporter read the question, your Honor?

THE COURT: Yes.

(Question read.)

A I don't recall any estimate that Mr. Schuman gave me prior to 1972.

Q I direct your attention to your SEC testimony once again, given on March 21, 1972, pages 40 to 41, line 18 on page 40 to line 24 on page 41.

MR. KAPLAN: Could we have those page numbers again, please?

MR. RUSCH: Page 40, line 18 to page 41, line 24.

(Pause.)

Have you read those lines, Mr. MacCallum?

A Yes, I have.

Q Does that refresh your recollection as to --

A I don't recall the conversation with Mr. Schuman. I have just read the testimony and I don't recall the conversation which that testimony apparently referred to.

Q Were you asked the following questions and did you give the following answers on March 21,

they should have done it in the first instance rather than ask him if he recalled, to ask him if he was asked this question at the SEC and if he made that answer. That I am going to permit.

Once they have their response to that I think that is an appropriate threshold question and we will take whatever objection you have in connection with any following matters. But the only matter before me now is a question being put to the witness as I understand it:

"Were you asked this question and did you make this answer?"

and I am overruling your objection and that is not to say that I am closing my ears to any subsequent objection to subsequent questions.

But that is all I have before me, it is overruled and you may ask that question and then we will see where we go from there.

MR. RUSCH: Thank you, your Honor.

Q Beginning on line 18:

"A Well, Mr. Schuman was only one exception prior to the situation here avoided any discussion of earnings per share.

"Q Avoided it?

"A Yes.

"Q What was the exception?

"A The exception, well, toward the close of the third quarter of 1971 there were rumors on the street that the actual company's earnings, the third quarter of 1971, they would be quite strong and as to the source of the rumors, I don't know. But the fact is that at the time there were rumors on the street. We got them from our customers also.

"Q From the customers?

"A Yes.

"Q Go on.

"A I asked Mr. Schuman --

"Q What did you ask him?

"A I asked him at the time how strong the third quarter looked. I challenged him with a specific number. I said, 'Does it look like it is going to 50 cents a share?'

"Well, referring to the above, if it would go above that such as north of that.

"Q North of it?

"A Yes.

"Q What did he say?

"A He said yes. That it would be a good quarter, better than 50 cents a share.

"Q Better?

"A Yes.

"Q Continue, please?

"A He said, 'It looks like it would be in the area of 60 cents.'"

Were you asked those questions and did you give those answers before the SEC March 21, 1972?

A I don't recall that conversation with the SEC.

MR. LIMAN: I move to strike.

THE COURT: I will let the answer stand, he doesn't recall it.

MR. LIMAN: I move to strike what was read to this witness.

THE COURT: I don't think it has evidentiary value in view of his response at the moment so I want the record very clear.

At the moment the question was put did he make that statement his answer was he doesn't recall. There is no independent record before

me that this statement was made. The transcript is not yet in evidence.

I am going to let the answer stand but I want the record to reflect the nature of the response means that the matter has no probative value as of this moment, at least as far as this Court is concerned.

Q At the time that you appeared before the SEC on March 21, 1972, did you testified truthfully upon that occasion?

MR. LIMAN: Objection to the form of that question. He can only ask whether he intended to tell the truth. The other would be a conclusion.

MR. RUSCH: He is the only one who can answer, he testified.

MR. LIMAN: His opinion is not pertinent.

MR. RUSCH: But the testimony is.

THE COURT: I am going to allow the question.

Q Do you have the question in mind, Mr. MacCallum?

A Yes. Did I testify truthfully? I testified to the best of my knowledge, to the

camera as that because at least Mr. MacCullum was represented by counsel and the fact that you were not there is one thing but I don't want the record to appear that this was a star chamber.

THE COURT: If Mr. MacCullum were here on the stand subsequent to cross-examination, complete cross-examination here and to be confronted and to confront Mr. Schuman I would not even consider the matter.

Further I must suggest from my examination of Rule 803, Section 24, the conditions of that have been met. The last portion of it with "however" I think has also been met by this transcript having been identified specifically in the pretrial order which was signed on January 23, 1967 which was previously signed by all counsel.

Under the circumstances I note the objection, the objection is overruled. The transcript in this respect will be received but I will tell the Commission that in view of the wording of the transcript, and in view of the explanation given by the declarant, I have considerable doubt that I will give the statement a great deal of weight.

That does not mean I will not give it any

weight. I want to consider the matter but I would suggest that within the discretion afforded me under the Federal Rules of Evidence, I am going to exercise my discretion by overruling the objection and receiving the portion or portions of the transcript which the SEC wants and any other portions of the transcripts which the defendants wish for purposes of completeness.

(Continued on next page.)

MR. LIMAN: Your Honor, would you permit me to complete the record by offering their answers to the interrogatories in which the SEC --

THE COURT: Yes, I think you should. Would you also date them? Because I have indicated the date of the pretrial order as January 23, 1976, and I would assume the interrogatory answers predate that.

MR. LIMAN: Yes, sir. And they are March 15, 1974, and I would offer --

THE COURT: They are filed here. Let me just get them and have them in front of me as you read them into the record.

Mr. Liman, are those the answers to the first set of interrogatories addressed to the plaintiff?

MR. LIMAN: Yes, your Honor.

THE COURT: Very well. I note that they were filed in this court on March 18, 1974. And now would you make reference to the particular interrogatory and answer or answers?

MR. LIMAN: Yes. I would refer your Honor to interrogatory 4. Do you want me to read it?

THE COURT: No, because it is filed

with the Court and I think it is part of the record.

MR. LIMAN: Right. Interrogatory 4 and the answer to --

THE COURT: Let me just read that first.

(Pause.)

Why don't you read it in? It is rather short.

MR. LIMAN: "Interrogatory 4. State separately for Bausch & Lomb and for Schuman whether or not the plaintiff alleges that Schuman or Bausch & Lomb has a propensity or natural inclination to violate Section 10(b) or Rule 10b-5, and, if so, specify the factual basis of such allegation.

"Answer to Interrogatory 4: Yes. Plaintiff respectfully refers to paragraphs 20-23, 27 and 30 of the complaint."

And I state for the record, and I think that the SEC would stipulate, that none of those paragraphs would refer to the incident which is being put into evidence via this transcript.

I would also --

MR. RUSCH: The complaint speaks for itself, your Honor.

THE COURT: Just bear with me a moment.

I want to follow you. I want to get the complaint again.

Would you indicate again the paragraph?

MR. LIMAN: Yes, your Honor. 20 to 23. And the other ones are Interrogatory 2, which is longer --

THE COURT: Wait a minute. I would like to look at the other paragraph. There were some other paragraphs, 27 and 30. You only said 20 to 23.

MR. LIMAN: Sorry.

THE COURT: I just want to read the other paragraphs.

Was there a paragraph 31 in the complaint?

MR. LIMAN: No, your Honor.

THE COURT: Would you just permit me? I just want to be sure. We will take five minutes.

(Recess.)

THE COURT: I have had a chance, Mr. Liman, to examine Interrogatory 4 and the answer to Interrogatory 4, and have referred to the paragraphs of the complaint. I believe you indicated that you wanted me to look at another interrogatory.

MR. LIMAN: Yes. It is Interrogatory 2, which also incorporates an answer to Interrogatory 1. It is a longer interrogatory and I could, if you want it in the record, just give it to the reporter to copy, both 1 and 2.

THE COURT: Very well.

Do you want me to look at 1 also?

MR. LIMAN: You have to, because the answer to 2 refers back to the answer to 1.

"Interrogatory No. 1.

"Specify separately to Bausch & Lomb and for Schuman the factual basis for the allegation in paragraph 1 of the complaint that Bausch & Lomb and Schuman were, as of the date of the complaint, engaged or about to engage in acts and practices which constituted and would constitute violation of Section 10(b) and Rule 10b(5).

"Answer to Interrogatory No. 1.

"Schuman as chairman of the board of BOL is the chief operating officer of BOL and his acts are the acts of the corporation. The factual basis for the allegations of paragraph 1 of the complaint are set forth in detail beginning with paragraph 7 of the complaint. BOL and Schuman

have denied any wrongdoing with respect to the allegations of the complaint. Furthermore, the 'open door policy' as described in the Fourth Defense by Defendants BOL and Schuman indicates that said defendants will continue to engage in those acts and practices considered by plaintiff to be violations of Section 10(b) and Rule 10b(5).

"Interrogatory No. 2.

"Specify separately for Bausch & Lomb and for Schuman the factual basis for the allegation in paragraph 3 of the complaint that Bausch & Lomb and Schuman 'will, unless restrained and enjoined, continue to engage in the acts and practices set forth in this complaint and in acts and practices of similar purport and object.'

"Answer to Interrogatory No. 2.

"Plaintiff respectfully responds to Interrogatory No. 1. In addition, plaintiff asserts that despite the violations alleged in the complaint, Schuman remains chairman of the board of BOL and that BOL is a publicly held corporation and the securities of BOL continue to be traded on the New York Stock Exchange. Upon the announcement of the instant lawsuit, BOL and Schuman denied that

they had violated the federal securities laws in connection with the activities of March 15, and 16, 1972."

MR. GREENSPOON: Your Honor, the Government would move to amend, pursuant to Rule 15(b) at this time, to treat with issues not raised by the pleadings or tried by express or implied consent, and so on.

I know you are not consenting, Mr. Kaplan. I am specifically referring to the second section and the second sentence in the third section of the Rule.

(Pause.)

THE COURT: In view of the application by the Commission, Mr. Liman and Mr. Morris, I would ask you to tell me if it is your view the admission of this evidence would prejudice you in maintaining your defenses upon the merits. If so, I am prepared to grant a continuance to enable any objecting party to meet such evidence.

MR. MORRIS: Well, your Honor, I think one thing we don't want is a continuance. We would like to get this lawsuit over with. But I find it incredible that here, on the afternoon of the third day of trial, in a lawsuit which was

commenced almost three years ago, we are faced for the first time, despite exhaustive discovery, with a claim of some other act which the Commission relies on to establish a propensity.

It is very clear from the interrogatories and from what has transpired before that the Commission has committed itself to the claims that are enumerated in the complaint and in these interrogatories.

MR. LIMAN: Speaking for Mr. Schuman, I regard a continuance as being even more prejudicial than the amendment. The fact is that in 1974, when they filed those answers to the interrogatories, or better still, at the time they filed their complaint, which was after they had examined this witness, if they had said that they claimed that there was a violation in October of 1971, there may have been an opportunity to have examined the witness when he had some recollection.

At this point, giving me a continuance, short of hypnosis on this witness, is not going to allow me to develop anything more through him.

My client has testified emphatically that he did not give out earnings estimates. I

could put him on the stand, though I don't think it is necessary to repeat it, and therefore two days, two weeks or two months won't add one iota to the evidence which I can offer on this issue.

And I really would suggest, your Honor, that the amendment is barred by laches, by their answers to the interrogatories.

But we are belaboring something which is now totally out of proportion. I have said my piece and I think we have all said what we can.

MR. SMITH: Your Honor, if I may, it is clear that they had this transcript at the time they served the complaint and at the time they gave the interrogatory answers, and there is no possible way they could have ignored it until this date.

MR. GREENSPOON: Unless we didn't know about it.

THE COURT: I overrule the objections to the admission of the portion of the transcript, will permit the defendants to put in any portions they wish, and will note for the record that, though offered, the defendants have declined the Court's offer of a continuance for the reasons which they have stated.

I might add, gentlemen, that at least this Court regards the evidence presented as cumulative.

I had concluded in my own mind that the activities of March 16th demonstrated the requisite intent. I was persuaded by that primarily from the testimony of Mr. Schuman, who,by what he told me on direct and cross examination, caused me to conclude that he was competent and in full command of his senses and judgment on March 16, 1972, when he was serving as chairman of the board of Bausch & Lomb.

I believe that he was equally competent and in command of his senses when he testified here earlier this week.

So to a certain extent I will tell you gentlemen that, even taking this at most, I would regard the evidence as cumulative. And if I put it aside completely, I would reach the conclusion at this juncture of the trial that the requisite intent has been demonstrated.

I would also tell you that the language read to me was sufficiently equivocal that I have some reservations, even absent these prior comments,

as to how much weight I would give it if I felt it was an absolute necessity from the point of view of the Commission's case.

I am going to leave the matter at that. I think I have expressed my views on the record. I have had an opportunity to see and hear Mr. Schuman. I am in the process of seeing and hearing Mr. MacCallum.

I have heard him say, after the event, that he has no recollection of this conversation. And I do also note that Mr. Liman elicited on voir dire a comment by the witness that he is not sure whether at the time he was testifying he had notes before him or not.

As I recall his testimony, by his reading or hearing the testimony he thought he did not have notes before him.

I have taken all these factors, including my observation of the witness, into account in making the comments which I have made.

MR. LIMAN: Your Honor, could I just say, though, given the fact it is a public company, that there is no suggestion on the record that I have ever argued that Mr. Schuman was not competent on

March 15, March 16 or when he testified during this trial. That is not the nature of our argument today.

THE COURT: I recognize that, Mr. Liman, and perhaps in the use of the word it carries with it certain connotations which I will tell you I did not either hear from you or intend to imply.

MR. LIMAN: Thank you, your Honor.

MR. RUSCH: Thank you, your Honor. The Commission has no further questions at this time.

THE COURT: Let's take our afternoon recess at this time. Ten minutes.

(Recess.)

THE COURT: You may proceed, Mr. Morris.

CROSS EXAMINATION

BY MR. MORRIS:

Q Mr. MacCallum, for how long a period of time have you been an analyst?

A 17 years.

Q And when did you first become interested in Bausch & Lomb?

A The first time I became interested in Bausch & Lomb was in early 1971.

Q And what was it about Bausch & Lomb in

early 1971 that attracted your attention?

A It was primarily the company's development of the soft lens.

Q And have you since that time, or from early '71 until 1972 conducted certain investigations on your own concerning the lens business, the contact lens business, and the optical industry and Bausch & Lomb?

A Yes. We conducted a number of investigations quite apart from Bausch & Lomb. I have spoken during that period of time, from early 1971 to March 1972, with a great number of people in the trade, that is to say, opthalmologists, optometrists, opticians. I spoke with one of the insurance companies which insured the soft lens itself. I spoke with competitors of Bausch & Lomb. I spoke with certain customers of Bausch & Lomb.

In addition to that, we commissioned a survey in early 1972, conducted by a nationally based market research organization named Gosselin & Co., which conducted a telephone survey of fitters, that is to say optometrists and opthalmologists, around the country in early 1972 relating to their acceptance of the soft lens, reasons for satisfaction

and reasons for dissatisfaction with the lens.

Q And did you attend the meetings of eye care professionals, practitioners?

A No, I did not.

Q As a matter of fact, did you try some soft contact lenses?

A Yes. I was fitted with a pair of soft lenses in, I believe, mid-1971 in Seattle, Washington. As a matter of fact --

Q Would you like to describe how it happened you went to Seattle, Washington to be fitted with soft lenses?

A Yes. Earlier I had been fitted with a pair of soft contact lenses manufactured by a company called Griffin Laboratories in Buffalo, New York. I found the lenses to be irritating and optically poor, very difficult to see with them.

I was simply concerned that if the Bausch & Lomb soft lens bore any qualitative relationship to the Griffin lens, that the product about which I was initially enthusiastic about would not be received as well as I had earlier thought.

So therefore, I felt it was important for me to get some feel for the Bausch & Lomb

product. I asked the company if I could be fitted with a pair of the lenses and I was told, I believe by Mr. Schuman, that the company would not fit me in Rochester, that I would have to find a fitter.

At that time that was the only area of the country in which the lens was being sold. I had to go through commercial channels outside the company.

I got on a plane, went to Seattle and was fittted with the soft lenses the next week.

Q And in addition, in your studies of Bausch & Lomb, did you read their reports to shareholders, quarterly and annually?

A Yes.

Q And the filings with the Securities and Exchange Commission?

A Yes.

Q Is it fair to say, sir, that a substantial portion of your professional time in 1971 was devoted to a study of this company and this industry?

MR. GREENSPOON: Objection, sir, unless we know what he means by "substantial."

THE COURT: Sustained.

Q All right. Can you estimate how much

of your time was devoted to a study of this company and this industry?

A In the first two or three months of following any company for the first time I spent a great deal of time on that company, and I would say with regard to Bausch & Lomb in my early investigation of the company, which is in the area of March, April of 1971, I spent a considerable amount of time, probably more than half of my time, in the initial investigation of the company.

The maintenance investigation, which I would characterize -- I would characterize all my subsequent following the company as basically of a maintenance nature, and the amount of time that I had to spend on Bausch & Lomb was probably no greater than perhaps 10 or 15 per cent of my time.

Q Now, during the course of your studies did you issue reports on Bausch & Lomb?

A Yes.

Q Which were distributed to your customers?

A Yes.

Q And I show you Exhibit HH and ask you if that is one of them, sir.

A Yes, it is.

MR. GREENSPOON: Mr. Morris, can you give me the number that was originally given to this?

MR. MORRIS: 34, it looks like.

MR. GREENSPOON: Defendants' Exhibit 34.

MR. MORRIS: Yes. That is a 31-page report on Bausch & Lomb.

Q Is that correct?

MR. GREENSPOON: What date?

MR. MORRIS: Dated July 14, 1971.

A Yes, this is my report.

Q And Exhibit II -- which, Mr. Greenspoon, was No. 35 -- is a followup report that you prepared on August 20, 1971?

A Yes, sir.

Q And those reports were followed by other reports, Mr. MacCallum?

A Yes, they were.

Q And did you become familiar in the course of 1971 with something called pipelining?

A Yes.

Q And did you refer to the question of pipelining in your reports?

A I believe I did.

Q I show you Exhibit QQ -- which was old 43,

Mr. Greenspoon -- and ask you if at the bottom of the second page of that report, being dated October 26, 1971, you referred to the impact of pipelining of fitters on the fourth quarter results of Bausch & Lomb.

MR. RUSCH: Your Honor, the document speaks for itself.

THE COURT: It is in evidence, is it?

MR. MORRIS: Yes, it is, your Honor.

THE COURT: Sustained.

A Yes, this covers the question of pipelining.

Q The matter of pipelining, or the filling of orders of practitioner kits, was something that was known by you back in October of '71, isn't that correct?

A Yes.

Q Now, Mr. MacCallum, you have interviewed hundreds of companies during the course of your professional career, I think you have testified to. Can you describe in general your conversations with Mr. Schuman with respect to the availability of numbers?

MR. GREENSPCON: Objection, sir. It is a generic question. He can ask him specifically

about each time he met with him.

THE COURT: Sustained. I don't think he met or spoke with Mr. Schuman that many times, and I think it is appropriate for you to specify and then go forward.

MR. MORRIS: All right.

Q Approximately how many times had you spoken with Mr. Schuman?

MR. GREENSPOON: As of what time?

MR. MORRIS: As of March 16th.

MR. RUSCH: 1972?

MR.MORRIS: Yes.

A Three times in person at the offices of the company, and by telephone probably at least that many times, at least three times, and probably no more than five times.

THE COURT: When you say three times personally, do you include March 16th, 1972?

THE WITNESS: Yes, sir.

THE COURT: So that you would have met with him on two occasions prior to that date?

THE WITNESS: Yes, sir.

THE COURT: The number of telephone conversations?

THE WITNESS: I'm estimating, and the number is in the area of five.

Q Had you characterized the company as difficult to communicate with?

A Yes. I felt during that time, during the entire process of the initial -- my initial study of Bausch & Lomb, and in fact in my initial study of the entire optical products industry, that the company was difficult to have a conversation with, yes.

MR. GREENSPOON: Your Honor, I move to strike the whole question and answer because I don't know what is meant by "difficult." If he wants to explore what it was he tried to do and what they wouldn't let him do or find out, I think that is another matter.

THE COURT: I will let it stand.

Q What do you mean by that, Mr. MacCallum, by "difficult"?

A Difficult? Well, I felt that -- I felt that Mr. Schuman's answers to me were relatively vague, vaguer than the normal flow of answers from companies with which I speak. He certainly never offered information. He certainly did not expand.

My recollection is that in my question of him he did not expand on any line of questioning that I brought up.

And I felt that from my vantage point, quite frankly, that Mr. Schuman was a relatively difficult man to speak with.

Q Did you ever get an earnings estimate or figure from him until the telephone conversation of March 16th?

A Well, I don't recall this incident back in October, and I think I have testified to that.

Q Did Mr. Schuman give you numbers when you asked for numbers?

THE COURT: Well, I would like an answer to the question. Then we can go on.

MR. MORRIS: All right.

THE COURT: You don't recall the October incident. Do you recall any other occasion prior to March 16, 1972 on which Mr. Schuman indicated, or revealed, earnings to you?

THE WITNESS: No. And it would not be in the nature of Mr. Schuman's --

THE COURT: No. The answer is no. I will leave it at that.

Q Did he ever give you production or sales numbers?

A Apart from generally responding to what I asked him in the car going down to Rochester, Mr. Schuman was quite vague about production and sales numbers.

Q I am going to jump for the moment to your testimony concerning your meeting on the morning of March 16 -- I will go back to the preliminary times in a few minutes.

You have mentioned a discussion about some warrants for National Patent stock Bausch & Lomb had. Was that new information to you, Mr. MacCallum?

A No.

Q Where had you gotten this information?

A It was available I believe in a proxy statement filed by National Patent.

Q There was conversation about aphakic lenses that morning?

A Yes.

Q Was the question of when the aphakic lenses were going to be coming out a significant or material fact as far as you were concerned?

MR. GREENSPOON: Objection.

THE COURT: Sustained.

The answer if any was taken down is stricken.

Q Was it significant to you whether the aphakic lens, in your evaluation of the company, whether the lenses were coming out or were shipped in March or April or May?

A No.

Q How about the date of shipping of mini-kits?

A No, it was not significant.

MR. GREENSPOON: That is an incomplete sentence.

THE COURT: I think so.

Q Was the question of when the minikit shipments were going to start a matter of significance to you in your analysis of the company?

A No, it was not.

Q As a matter of fact, Mr. MacCallum, you had reached some quite definite conclusions about this company before you took that trip to Rochester?

MR. RUSCH: I object to the form of the question, quite definite.

THE COURT: Yes, sustained as to form.

Q You on behalf of Faulkner, Dawkins ~~Dwight~~ recommended purchse of this stock from a time in mid-1971 right up until March 16, 1972, is that correct?

A Our public recommendation had been until that time to buy the stock.

Q During the period of your recommendation the stock had reached as high as what?

A I believe the low 190's.

Q As of February, what was the level of the stock?

A During February the stock was under a great deal of pressure --

MR. GREENSPOON: I object to that part of the answer.

THE COURT: yes, I think the question are the numbers is what counsel is eliciting if you know.

THE WITNESS: I don't recall the price of the stock at that time specifically, no.

THE COURT: You don't recall it now looking back to then but you were aware of the price I would assume back in 1972?

THE WITNESS: yes, sir. I think what I was being asked is what was he range in the month of

February and I don't recall.

THE COURT: Fine. I think the best evidence is one of the exhibits.

MR. MORRIS: Yes, your Honor.

I am going to refer Mr. MacCallur now to Exhibit KKKKK originally 115 which is in evidence which is a chart which shows the closing prices of Bausch & Lomb stock per week.

Q During the months of January, February and March what happened to the price level of Bausch & Lomb?

THE COURT: The exhibit speaks for itself and the Court is looking at it.

I would note on February 18 the stock appears to have been at 185 perhaps and a fraction and by March 15 it was at approximately 125, the way I see it.

MR. GREENSPOON: What date was that?

THE COURT: March. These are Friday closings. I would say the weekend of March 17.

MR. RUSCH: There was no trading March 17.

MR. MORRIS: That is the closing figure for March 16, Thursday.

THE COURT: Very well. It doesn't appear

that way but I see there is something written that I can't make out.

In any event, we have a steady decline in price between the February date to which you made reference and March 16, at which point the stock had reached 125 or therebouts.

Q Mr. MacCallum, your recommendation during January and February had been continued as a buy recommendation, had it not?

A Yes, sir.

Q Would you tell the Court, please, what studies you made ofthe company in February and what conclusion you came to and what conversations you had concerning your analysis of this stock?

MR. GREENSPOON: If you had any studies.

THE COURT: Yes.

A Yes, sir. There were a series of studies and a series of, as I say, an independent market research study which we commissioned in January had corroborated in a major way the apprehension that I had that the acceptance of the lens was not going forward at a rate which we had earlier anticipated.

The lens beginning in late 1971 was the subject of a great deal of questions and reports of

contamination building up within the molecular structure of the lens itself.

There was a meeting of the American Association of Ophthalmology in New Orleans in early 1972, at which reports of spots, brick spots appear- in the lens were released.

That report was widely publicized and I felt that anyone putting such a substance in their eye, reading about contamination of that substance, would be scared to death to put such a product in their eye.

THE COURT: Were you using the Soflens at that point?

THE WITNESS: I had used the Soflens approximately three days and found it to be in my case painful. One day I had it on inside out.

MR. GREENSPOON: You couldn't blame that on the Soflens.

THE WITNESS: Furthermore, the lens in my eye decentered which was to say that it floated down on the surface of the cornea and gave me very poor vision.

I found out in speaking with ophthal- mologists around the country this was a problem

indeed with the lens, there was a decentering problem and that the company was not getting the close fit to the surface of the cornea.

As I said in early January we commissioned a study -- I believe late December -- we commissioned the study of the nation's fitters and we found in that study that the acceptance level of the lens was suprisingly low and there were a great number of objections first of all the way Bausch & Lomb had introduced the lens and promoted the lens; and, secondly, a number of objections about the lens itself.

So that my level of anxiety and apprehension built up steadily across late 1971 and into 1972, early 1972.

Then in late February I believe it was the company then announced it had stopped shipping the lens because of a sterility problem and I simply felt that it was one more linking of words, or very negative words in this case, insterility to the lens and I felt that the acceptance of the lens was being damaged by that.

Q In early 1972 had you made and published a first quarter earnings estimate for Bausch & Lomb?

A In early 1972? I don't recall.

Q To refresh your recollection, did you ever make an estimate of 90 cents for the first quarter?

A A written estimate of 90 cents? I don't recall. I do recall that was certainly my thinking in early 1972.

MR. GREENSPOON: Could you indicate at what time?

THE COURT: Early 1972 is all he said so far.

MR. GREENSPOON: I will withhold until I hear the next question.

Q Had you published an estimate of year earnings for 1972?

A I don't recall if --

MR. GREENSPOON: I object to that because there is no time reference here, no time frame.

THE COURT: Let's see, it was yes or no. So far the witness says I don't recall so we are not that far along.

A I don't recall if it was a written estimate in early 1972 of 1972 earnings.

THE COURT: Annual earnings?

A Annual earnings for the company. Certainly

I had mentally, I had in early 1972 a good idea of what I had hoped the company could earn at that time.

Q What was that figure?

A $6 a share.

THE COURT: Did you indicate that in written form at any point?

THE WITNESS: I can't recall.

THE COURT: Did you indicate it orally at any point?

THE WITNESS: I am sure I did.

THE COURT: When and to whom?

THE WITNESS: I don't recall to whom and I don't recall when.

Q May I refer you to Plaintiff's Exhibit 66, March 2, 1972, Mr. MacCallum. That is a report that you made and published?

A Yes.

Q And did you at that time in that report of March 2 state in words or in substance that you were maintaining your $6 estimate of earnings for the year?

A Yes, I did.

Q Also while this report is in front of you,

did you at that time on March 2, 1972, when that was published, did you estimate a reduction in the kit sales for the first quarter of 1972 as compared to the fourth quarter of 1971?

A Yes.

Q Does that, Mr. MacCallum, reflect this matter of pipelining that we talked about?

A It reflected both the gradual cessation of pipelining and also reflected the question which I had of the acceptance of the lens by professionals.

Q Did there come a time when you had some conversations within your company concerning your earning estimates for the first quarter and per year 1972?

MR. RUSCH: Can we have a time?

MR. MORRIS: I said did there come a time.

THE COURT: The first answer has to be yes or no.

A Yes.

Q Approximately when was that?

A That was I believe in late February, mid to late February; probably early March.

Q What facts had come to your attention at that time which prompted a consideration of this

question?

MR. GREENSPOON: Objection, there is no evidence to indicate that anything came to his attention.

THE COURT: Sustained as to form.

Q Had any facts come to your attention with regard to the validity of your earnings estimate?

A Yes.

Q Would you tell the Court what those facts were?

A Well, the facts were the very disquieting results of our survey which indicated that an enthusiastic estimate of acceptance of the lens was groundless.

Furthermore, as the evidence mounted with regard to the -- excuse me, not the evidence but rumors of the contamination of the lens and of the contamination ability of the lens, I became increasingly anxious about the acceptance of it and in conversations with fitters around the country, it was quite obvious that they were very aware of it as well.

Q Did your research along these subjects

continue during this period of time?

A Yes, it did.

Q Did you reach any conclusions prior to March 16 concerning the earnings estimate for Bausch & Lomb for the first quarter of the year?

A I had not reached any written conclusions, no. However, I did have a conversation, engaged in a number of conversations but I think one important conversation was with my managing partner Mr. Faulkner I believe in late February at which time I brought to his attention the severity of the problems facing Bausch & Lomb and at which time I recommended we both withdraw the recommendation to buy the stock and that we cool off our estimate of earnings and of lens acceptance.

Q That was approximately when?

A This was, as I say I can't remember the date but it was in mid to late February, possibly early March.

Q Did you do that, make that change at that time?

A No. Mr. Faulkner --

Q Why not?

A Mr. Faulkner recommended to me that I

go up to Rochester and that I give the company an opportunity to challenge my assumptions and really as a matter of form and courtesy, since we were now going to disengage from the stock, we do so.

Q You say since we were going to disengage from the stock. You determined to do that?

A I was all but certain that is what I wanted to do.

Q Why did you wait until the 16th of March to make that change, Mr. MacCallum?

A I wanted to make that change earlier and in fact called Mr. Schuman's office, I believe two weeks or so before the meeting on March 16 with him. I had no idea at that time that he was on vacation. I found that out at that time for the first time.

Really it was Mr. Schuman's being on vacation that caused the delay between the time of my attempted change in recommendation to the time I finally did it.

Q Was there discussion during that meeting about a revision of Bausch & Lomb's budget?

A I don't recall.

THE COURT: What meeting now?

MR. MORRIS: The meeting of the morning

of March 16.

A I don't recall a discussion at that meeting about the budget.

Q Let me go back again to the conversation with Mr. Faulkner in late February.

At that time the stock had reached -- what price was the stock, approximately?

A In late February?

Q Yes.

A Reading from this chart that you presented me, the stock was about 170 at that time.

Q Is it fair to say, Mr. MacCallum, that if you were going to change your recommendation on the stock you wanted to be able to say that you were withdrawing your recommendation based on an interview with Mr. Schuman?

MR. RUSCH: I object to the form of that question, your Honor. It is speculative.

MR. MORRIS: I am asking if it is fair to say.

THE COURT: He can say if it isn't.

A It is fair to say that it would be difficult to go to our clients and say that we have pulled

the buy recommendation on the stock without having talked to the company.

Q Had you decided to pull?

THE COURT: Did you have a practice of speaking directly to companies prior to revising buy recommendations at that time?

THE WITNESS: Either instituting or withdrawing? Yes, sir.

THE COURT: In other words, as a practice you would not put a buy recommendation or take it out without speaking with the company or attempting to speak to the company first?

THE WITNESS: Well, certainly not institute a buy recommendation under any circumstances without speaking to the company first. That would be extraordinarily improper.

THE COURT: I will strike that it would be extraordinarily improper.

THE WITNESS: For me.

THE COURT: It just your characterization that I am striking from the record. You can continue with your answer.

THE WITNESS: I think it would be less -- I can think of, sir, where a buy recommendation was with-

drawn without speaking to the company, if you could give me -- I could give you some examples I can think of within a day or two.

THE COURT: But the practice was to do what?

THE WITNESS: To speak with the company before changing the recommendation of the stock.

Q At the time you went to meet Mr. Schuman in Rochester on the morning of March 16, what was your fundamental conclusion or basic conclusion if any about Bausch & Lomb stock?

MR. GREENSPOON: Objection.

THE COURT: Sustained as to form.

Q Had you reached at the time you went to Rochester on the morning of March 16, had you reached any decision concerning your recommendation on Bausch & Lomb stock?

A Yes, I had, yes.

Q What was that decision?

A My strong feeling was at that time that the company was in trouble and I wanted to withdraw the recommendation on the stock.

Q Did Mr. Schuman say --

MR. GREENSPOON: May I hear the question

and answer again, please?

THE COURT: Yes.

(Record read.)

Q Was there anything you learned in words or substance from Mr. Schuman during the course of that conversation that changed that decision or affected it?

MR. GREENSPOON: Objection, sir.

THE COURT: Sustained.

Q Did you change the decision after speaking to Mr. Schuman?

A No.

Q Or did you change it after getting the telephone calls from him?

A No.

Q Were earnings figures mentioned during the morning conversation with Mr. Schuman?

A No.

Q There was some discussion in your direct examination about conversation that morning of March 16 concerning traditional business of Bausch & Lomb.

Do you recall there was such conversation?

A Yes.

Q Had that information been available to you prior to this meeting?

MR. GREENSPOON: Objection, your Honor, I don't know what the information is.

THE COURT: Sustained.

Q Prior to the time of that meeting had there been fairly widespread estimates on Wall Street that 1972 that the traditional business --

MR. LANG: Object to the form, wide-spread.

THE COURT: Sustained.

Q Had there been any such rumors?

A I don't recall that specific month but I do recall a great deal of speculation about the earnings level of the existing business. I do recall that the trend of earnings from the traditional business was going to be up but not spectacular.

MR. GREENSPOON: Does that mean that is rumors that he heard or some information he had? I don't understand the answer.

THE COURT: I will let the witness respond to you directly.

A I believe there were a number of other brokerage house reports that attempted to break out the traditional earnings from the Soflens earnings of Bausch & Lomb.

There was a great deal of conversation on the street between myself and clients and between clients and other analysts about the composition of the company's earnings between traditional and Soflens sources. Quite frankly I don't think --

Did you ask me that?

Q That was my next question.

Mr. MacCallum, in your study of the company and your analysis of it, were the earnings from the traditional lines of business significant?

A That was clearly not a relevant factor in what was making the stock move and --

MR. GREENSPOON: I object to that, sir.

THE COURT: Sustained.

MR. GREENSPOON: I move to strike it.

THE COURT: Strike it.

Read the question.

(Question read.)

A Were they significant? In my opinion

they were not a significant factor in the price of the stock, no, and that is what I said to you.

MR. GREENSPOON: If that was the same answer I heard before I move to strike it as well. I don't know if that was the same answer I heard before.

THE COURT: I will let it stand.

Q Were you aware of the newspaper publicity during January and February and the first part of March 1972 concerning the ophthalmic business of Bausch & Lomb and the soft contact lenses?

THE COURT: Sustained.

Q You mentioned newspaper publicity earlier. What kind of articles appeared in the press?

MR. LANG: Objection to the form of the question.

THE COURT: Kinds of articles, sustained.

Q Mr. MacCallum, in your studies of this stock and of the company were the price levels of the stock affected by articles which appeared In the public press?

MR. GREENSPOON: Objection, your Honor.

THE COURT: Sustained.

Q Was there any correlation between the

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price level of the stock?

MR. GREENSPOON: Same objection.

THE COURT: Sustained.

Q Mr. MacCallum, referring you to Plaintiff's Exhibit 66, your report of March 2, 1972, the bottom of the second page the expression, "The considerable and unrelenting level of negative rumors relating to the lens."

MR. GREENSPOON: He has already testified to these things.

THE COURT: Well, he hasn't been asked this question and therefore I will allow it.

Overruled.

A The things I was referring to in this bulletin were the contamination problem, the report from New Orleans relating to the brick red spots appearing in the matrix of the lens.

The problems developing in keeping the lens sterilized properly, the sterility problem in the shipping vial. The potentially increase of additional competition.

Q Who were some of the potential competitors?

A Potentially a company called Frigitronics which had licensed the product to Warner-Lambert;

Dupont, Union Corporation; and a number of smaller competitors.

Q Do you recall any other publicity in the newspaper which affected the prospects of Bausch & Lomb prior to March 16?

A Apart from the problems I just testified to?

Q Yes. Do you recall any action taken with respect to Bausch & Lomb by Smith Barney & Company?

A Let me answer your question first of all. Yes, there was --

MR. GREENSPOON: Which question?

A The first question he asked me. There was a rumor of an investigation of the entire soft lens industry by a Senate Subcommittee which was yet another irritant I felt to the price of the stock.

I spoke with staff counsel on the Senate Committee. Both the name of the counsel -- the name of the counsel was Ben Gordon. The committee on which Mr. Gordon was the counsel escapes me. But that was one other problem I think if I might add.

THE COURT: When did that come to your attention if you recall?

THE WITNESS: I believe that was in January or February 1972.

THE COURT: Prior to your report of March 2?

THE WITNESS: Yes, sir.

Q I asked whether it came to your attention that Smith Barney published something about Bausch & Lomb?

A Yes.

Q What was that?

A I had never seen the Smith Barney report --

MR. GREENSPOON: I object to anything that he testifies with respect to it.

THE COURT: He could have heard about it and I will let that stand.

A I certainly heard about it.

Q Was it publicized in the press?

MR. GREENSPOON: Objection.

THE COURT: I will allow it.

MR. MORRIS: It is in evidence that it was.

A I don't know. I don't recall.

Q You knew about it?

A I certainly knew about it, yes. I certainly heard about it.

Q What did Smith Barney's withdrawal of its

buy recommendation, what effect did that have if any on your views?

A None.

Q Did you have any knowledge or information when you went to Mr. Schuman's office on the morning of March 16 about a large block of stock overhanging the market?

A No.

Q Was there anything, Mr. MacCallum, that you heard in your conversation with Mr. Schuman on the morning of March 16 that changed your fundamental assumption or opinions about the company and the value of its stock?

MR. GREENSPOON: Objection, sir.

THE COURT: Sustained.

MR. MORRIS: That is a very proper question, your Honor.

THE COURT: Not in that form it isn't.

Q Was there any fact, Mr. MacCallum, that you heard from Mr. Schuman that morning which changed your opinion that you had concerning the stock?

MR. GREENSPOON: Same objection.

THE COURT: I will allow that question with an answer or yes or no.

A No.

Q Did it appear in the press at some time that the events of March 16, 1972, and I refer to your conversations with Mr. Schuman, became the subject of public investigations?

A Did it appear in the press?

Q Yes.

A Yes, it ~~did~~ did.

Q Do you recall how soon after March 16 it appeared in the press?

A I don't recall if it was the following day or the following Monday but shortly thereafter.

Q Did it appear in the press what investigations were being had?

MR. GREENSPOON: I object to that, your Honor.

THE COURT: Sustained.

Q Did it come to your attention there was an SEC investigation or that the SEC was investigating the events?

MR. GREENSPOON: Objection.

MR. MORRIS: This is in evidence.

THE COURT: It is so clear that I don't know why it is asked but it was asked and I will allow

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i to be answered.

Answer the question.

Objection overruled.

A Yes, it certainly came to my attention that the SEC was curious about the events of March 16.

Q You, of course, read Mr. Dorfman's article in the Wall Street Journal on the morning of the 17th?

A I don't recall reading it but I am sure I did.

Q Certainly it was the subject of conversation and testimony by you, was it not?

A Testimony by me? I don't recall.

Q You testified that the Attorney General, the SEC and also in the civil litigation, did you not?

A I did testify to those bodies, yes.

MR. MORRIS: That is all I have at this time.

BY MR. LIMAN:

Q Mr. MacCallum, between March 16 and yesterday or today when you saw Mr. Schuman in this courtroom, have you had any conversations with him?

A No.

Q Have you been following Bausch & Lomb

stock?

A No, sir.

Q Does your firm follow it any more?

A No, sir.

Q You have no relationship whatsoever with Mr. Schuman of Bausch & Lomb, am I correct?

A None.

Q But you still are subject to regulation by the SEC?

A Yes, sir.

Q Now, I want to go back over briefly a number of matters of where you were at in your own investigation of Bausch & Lomb at the time you saw Mr. Schuman.

I will show you Plaintiff's Exhibit 2 in evidence and I will ask you whether this is a letter dated February 25, 1972 which you sent to Mr. Harby, the president of Bausch & Lomb.

A Yes, sir.

Q Did that letter enclose a draft of a report you were preparing on Bausch & Lomb?

A Yes.

Q That draft report of yours, am I correct, contained your best estimate as to the sales of the

Soflens, the fittings, the earnings, am I correct?

A Yes, sir.

Q Is it also correct that in your profession you do not accept as gospel figures that the company issues?

MR. RUSCH: I object to the form of the question.

THE COURT: Yes, I think I have to sustain the objection.

Q In making your own estimates, do you accept as conclusive any figures you may get from the company?

MR. RUSCH: I object to that again, your Honor.

THE COURT: Sustained.

Any figures might be a little too broad.

Q What do you do in order to estimate earnings?

A Well, it is a terribly complex process. The analysts -- I look at the general economic factors facing the company; look at factors that are peculiar to the company.

If there is any important product I try to learn as much about that product, its acceptance at

the user level, the potential competitive particulars of the product.

Q In this case you even were prepared to use your own eyes as guinea pigs?

A I used myself as a guinea pig.

Q I just want to ask you -- can you hold that and I just ask you did you testify that you tried on a Griffin lens to test a competitive lens?

A Yes, sir.

Q You tried it on knowing it hadn't even been approved by the FDA?

A Yes, sir.

Q Continue?

THE COURT: I think you were telling us how you came to your evaluation of earnings.

A I read the trade press very carefully. I read the medical literature very carefully. I read the lay press, the Wall Street Journal, the New York Times, I believe carefully.

I read company releases: annual reports, quarterly reports, proxy material, 10-K's, 10-Q's, 8-K's.

We have a subscription to publications outside the United States. Companies file reports, documents with foreign governments, we look at that. We

look at that. We read the foreign press to some extent, talk with the trade, talk with customers.

Q Am I correct that in your profession you view with some skepticism the company's own estimate of its prospects?

A Absolutely.

THE COURT: You say that across the board or does your skepticism vary from company to company?

THE WITNESS: I would say that the company's feelings about how it is doing and what it hopes to do represent really hopes of the company and that hope, I think, should be independently tested against a variety of other sources.

(Continued on next page.)

Q Now getting back to this exhibit Plaintiff's Exhibit 2, am I correct that you prepared this exhibit, your draft report dated February 22, 1972, after you had conducted the investigation of practitioners and efforts at market survey that you discussed when Mr. Morris was asking you questions?

A Of course that was ongoing --

Q Right?

A -- at that time. And this was certainly prepared with those factors in mind, yes.

Q Am I correct that in this draft report, at page 10, you made a prediction of the earnings for the company? Am I correct?

A Yes.

Q And that was that prediction of $6 a share, am I correct?

A Well, it was $6.53.

Q But you round off things in your profession.

A Well, I rounded it off to $6, yes.

Q You rounded it off to $6.

Now, in making this prediction of earnings, you concluded that Bausch & Lomb's earnings for the first quarter would be 90 cents? Am I reading that correctly?

A Yes, sir.

Q And to arrive at that figure you made an estimate of the number of kits that Bausch & Lomb would sell in the first quarter, among other things?

A Yes, indeed.

Q And am I correct, if I may direct your attention to page 4, that you estimated that Bausch & Lomb would sell 1,900 kits in the first quarter of 1972?

A Yes, sir.

Q And on the basis of that estimate and your other estimates of the business you arrived at the 90 cent estimate of earnings for the first quarter?

A Yes.

Q Now, directing your attention to Plaintiff's Exhibit 66, which is the bulletin you actually published on March 2nd concerning Bausch & Lomb, am I correct that you revised your estimate of first quarter kit sales down to 800 in that published report?

A Yes.

Q So that you dropped your estimate from

1,900 to 800, am I correct?

THE COURT: This is Exhibit 66?

A Yes. And revised the estimate for the year as well.

Q And you revised the number of kits that would be shipped in the year downward also, am I correct?

A That is correct.

Q You revised it downward from 11,600, which appeared in Exhibit 2, to 6,400, am I correct?

A That is correct.

Q Now, would it be fair to say that if you revised your estimate of sales downward by almost 40 per cent that that would necessitate a revision downward of your estimate of earnings?

A Yes.

Q And is it corredt that in your March 2nd report you did not take that additional step of revising the $6 earnings figure?

A That is correct.

Q And you didn't take that step, even though your revision of the estimate of sales would require it, because you had a conversation with Mr. Faulkner.

A That is correct.

Q And you told Mr. Faulkner that you wanted to revise your earnings figure and you wanted to withdraw your buy recommendation, am I correct?

A That is correct.

Q And Mr. Faulkner said to you in words or substance that as a matter of the convention of this business you had to call on Bausch & Lomb before you did that, am I correct?

MR. RUSCH: I object to that, your Honor. That was not the testimony.

THE COURT: Sustained.

Q Did Mr. Faulkner say that to you in words or in substance?

THE COURT: Didn't Mr. Faulkner just suggest that you go to Rochester and speak with the company? Isn't that what you said before? What did he say?

THE WITNESS: He said -- yes, he said that it would be appropriate to go to the company, and for all we knew the company had discovered oil in the north --

THE COURT: No. What did he say?

THE WITNESS: He said it would be appropriate

to go to see the company before we published -- before we withdrew the buy recommendation.

Q And did you testify earlier that this was a matter of form and courtesy?

A Yes.

Q Those were your words. And is it also true that it is a matter of convention in your business that before you withdraw a recommendation you see the company so that you can tell your customers you have done that?

A I can't answer for our business.

Q What about your own company?

A For our own company, yes, it certainly is.

Q And you went to see Mr. Shuman on the 16th, is that correct?

A Yes, it is.

Q And can you tell me whether, in the light of your own independent research, there is anything that he could have said to you that would have caused you to change your decision to withdraw this buy recommendation?

MR. GREENSPOON: I object to that, your Honor.

THE COURT: Sustained.

Q Did he make any effort at all to dissuade you from your way of thinking?

MR. RUSCH: Objection, your Honor.

MR. GREENSPOON: Objection.

THE COURT: Sustained.

Q Is it a fact that Faulkner and Dawkins advised customers that you were making this trip?

A Yes.

Q Now, you gave some testimony this morning about a five minute car ride you had with Mr. Schuman, am I correct?

A Yes.

Q Mr. Schuman was driving the car?

A Yes.

Q You were a passenger in it, talking to him.

A Yes.

Q Now, you weren't taking notes, I take it, while you were sitting there and he was driving, is that correct?

A That is correct.

Q So in giving your testimony here as well as your testimony in various investigative

proceedings you were relying on a recollection you had as opposed to notes you were making when he was talking, is that correct?

MR. RUSCH: I object, your Honor. The testimony speak for themselves.

THE COURT: Well, he wasn't making notes when he was speaking to Mr. Schuman in the car. We are clear on that. He did do certain work on the airplane shortly after leaving Mr. Schuman, and we have some testimony on that.

I am going to let the record speak for itself. I am going to let him answer the question, if he can.

THE WITNESS: I'm sorry. I lost it.

MR. LIMAN: I think the answer was self-evident. He didn't make notes. Let me move on.

Q There has been reference to your notes here that you took. Did you, in taking notes, attempt to record what Mr. Schuman was saying to you only, or were you also putting down impressions of your own and thoughts of your own?

THE COURT: During your interview, that is.

A During the interview or during the ride in the car?

THE COURT: I understand you took no notes in the car.

THE WITNESS: No. I had an interview in the car, though -- I'm sorry -- before that.

THE COURT: You didn't take any notes in the car.

THE WITNESS: No, sir.

THE COURT: Now we go back to the office.

THE WITNESS: The interview itself?

THE COURT: Yes. Mr. Liman's question is addressed to that particular time.

THE WITNESS: The notes that I take -- the material written on those yellow ledger pads, yellow ledger sheets, can either represent notes taken from what Mr. Schuman said, thoughts of my own, or topics to be discussed subsequently as Mr. Schuman is speaking about another topic.

Q Is it also true in your profession as an analyst that sometimes, as you speak to an executive, you will draw inferences from what he said?

MR. GREENSPOON: I object to that, sir, unless he wants to ask if that is what he does.

MR. LIMAN: I am asking him whether he

draws inferences in his profession.

MR. GREENSPOON: I thought he said --

THE COURT: The question was a little involved originally and I can understand your thinking, Mr. Greenspoon.

Q Do you draw inferences from what an executive says when you are interviewing him?

A Yes.

Q And you will often ask indirect questions to a witness in order to gauge an impression, am I correct?

A Yes.

Q And you will then record your inference?

A That happens frequently, yes.

Q Now, do you recall this morning that you were asked about some numbers that you gave to Mr. Schuman in this car ride?

A Yes. I recall that question, yes.

Q Now, is it your testimony that Mr. Schuman told you that your estimate of kit sales was correct or substantially correct?

A My recollection is that my estimate was substantially correct and Mr. Schuman indicated that to me, yes.

Q Do you remember on April 14, 1972 you gave some testimony before the Attorney General of the State of New York?

A Yes.

Q And directing your attention to page 21-- I don't think I have an extra copy for your Honor because we just got this from the SEC last week --

"Q Getting back to the kits, how many did you estimate to be sold in your March report?

"A 800 kits.

"Q What did Mr. Schuman tell you on March 16th?

"A The only comment about kits, as I recall, was that kit sales were lower for the first quarter than they were for the fourth quarter. 800 would be lower than my estimate in the fourth quarter."

Do you remember giving --

MR. RUSCH: Would you please read the next question and answer.

A I don't remember that conversation with the Attorney General.

Q Can you tell me whether, as you sit here today, you can say whether you drew an

inference from what Mr. Schuman said that your figures were substantially correct or whether he came right out and said it?

MR. GREENSPOON: Objection, sir.

He just testified he doesn't recall it.

THE COURT: Well, let's find out if he does.

A You are asking me whether I recall the conversation with Mr. Schuman, not the conversation with the Attorney General?

Q That's right. I am asking you whether you drew an inference from the conversation that your figures were substantially correct or whether he came right out and said it.

THE COURT: In words or in substance.

A I don't believe Mr. Schuman said a number. I believe that I was providing the numerical support and Mr. Schuman was commenting on whether or not I was in the right direction.

THE COURT: And what was his comment? What did he say? Do you remember what he said?

THE COURT: If you remember.

A Do I remember what he said? No, I don't remember what he said.

THE COURT: In substance, what did he say?

THE WITNESS: In substance he said that seems in the right area.

Q And whatever those words were that he used, am I correct that you drew an inference that your numbers were reasonable?

A Yes.

Q And do you know whether he said words to the effect that you had done your homework well?

A I don't remember him saying that, no.

Q Now, you also gave some testimony this morning about numbers you gave on the number of fits for the first quarter, am I correct?

A Yes.

Q And you testified that you threw out a number of, I think, 20,000 fits for the first quarter? Is that the number you were using then?

A That, I believe, was the number that I was using at that time, yes, sir.

Q And again am I correct that your testimony is that Mr. Schuman's response to you reaffirmed your belief in that number?

A Yes.

Q Do you remember what his words were?

A No, I don't. I don't recall his words, no.

Q Is it a fact, sir, that his response conveyed no meaning to you?

MR. GREENSPOON: Objection, sir. He specified he doesn't know what it was.

THE COURT: Sustained.

Q Do you remember, when you gave testimony before the State Attorney General on the same date, and this is at page 20 and 21, beginning with the reference to your 20,000 fit number, you were asked:

"Q And he said you were correct?

"A Yes.

"Q He agreed with you that you were correct?

"A But that number can mean anything to me between 10 and 20,000, and in fact that number in itself did not mean anything to me apart from the fact that it was not considerably larger than that number. I felt that it was an improper interviewing technique to ask him to be more specific, and therefore I did not ask him.

"Q Why would that be improper?

"A I felt it did not elicit an answer. Number one, by asking him for a specific number in the first place, he would not provide me with a specific number. He was attempting to give me a general overall feel, and I felt that was all I could legitimately expect."

Did you give that testimony?

A Yes, I gave that testimony.

Q And is it a fact that whatever it was that Mr. Schuman said to you conveyed no more than that the number could be between 10 and 20,000?

MR. GREENSPOON: The record speaks for itself, your Honor. He said he gave the testimony.

THE COURT: Yes. Sustained.

Q Do you remember testifying before the Attorney General that Mr. Schuman told you nothing new?

A I don't remember the testimony in that detail in front of the Attorney General. I certainly learned nothing new from Mr. Schuman, no.

MR. GREENSPOON: I move to strike the last part of the sentence.

THE COURT: Yes. It is not responsive.

Q Well, is it a fact that you did learn

nothing new from Mr. Schuman in that interview?

A It is a fact that I learned nothing new from Mr. Schuman in that interview.

MR. GREENSPOON: I didn't get the last part.

THE WITNESS: I learned nothing new from Mr. Schuman in that interview. My questioning of Mr. Schuman in the car was to see if my estimates were miles off, and I don't attach -- I did not at that time, nor do I now, attach any significance to the numbers themselves.

MR. GREENSPOON: Do I understand -- one moment, sir -- that the answer that he is giving is relating to the numbers about which Mr. Liman had been talking to him?

THE COURT: No. That was my understanding. Let me find out.

Were you referring to the numbers that Mr. Liman had just pointed out to you?

THE WITNESS: Yes. The consumer fits, yes.

BY MR. LIMAN:

Q Is it also true that you learned nothing new from Mr. Schuman that you attached any significance

to in this interview with him?

A That is correct.

Q Is it a fact that Mr. Schuman did not in this interview in Rochester, either in the car or in his office, give you any earnings estimate for the company?

A Apart from the recollection -- apart from not being able to recall the precise discussion which Mr. Schuman and I had relating to the earnings of the traditional business, the answer is no.

THE COURT: You are saying that he said nothing to you about the earnings of the soft lens business?

THE WITNESS: We had no conversation about the earnings of the company itself.

Q Of the company itself.

A As a corporate whole.

Q And you had no conversation about the estimate of earnings for Soflens.

A That is correct.

Q Do you remember how high the multiple was that Bausch & Lomb was obtaining in the marketplace, the stock market, in 1972?

A In the early part of 1972?

Q Yes. Up until March 16th, what did it range from?

A It depends on what earnings eestimate you use.

Q Well, what about your own earnings estimate? It was over --

A It was over --

MR. GREENSPOON: Which earnings estimate, Mr. Liman?

Q The $6 figure that you had. That was the highest earnings estimate, am I correct?

A That's right. Although there were, I do recall, higher earnings estimates in the street.

Using $6.00, the stock was selling at over 30 times earnings.

Q Using $4, it was selling at --

A Using $4 per share, it was selling at close to 50 times earnings.

Q And am I correct that in your opinion as a market analyst that this company would not have commanded that multiple except for Soflens?

A Absolutely.

Q It was trading in the stock market

on Soflens, not on its traditional business.

A Correct.

MR. GREENSPOON: That is, in his opinion?

Q In your opinion.

A Very clearly.

Q And am I correct that in that report that you sent to Mr. Harby on February 25th -- and I am referring to Plaintiff's Exhibit 2-- you estimated $1.88 as the earnings from the traditional businesses of Bausch & Lomb?

A Yes, sir.

Q And you based that on published sources and your own independent investigation, am I correct?

A Yes.

Q Now, is it also correct that in your conversation with Mr. Schuman in Rochester that morning he gave you no estimate of first quarter earnings for Bausch & Lomb?

MR. RUSCH: Your Honor, I object to the form of the question in adding continually the preface "Is it correct."

THE COURT: All right. He is rephrasing the question.

MR. LIMAN: It is cross examination.

THE COURT: Yes, it is.

Q But did Mr. Schuman give you an earnings estimate for the first quarter of 1972 in Rochester?

A Absolutely not.

Q Mr. MacCallum, you were asked about testimony you gave concerning a third quarter 1971 estimate. Do you recall that?

A Yes.

Q Do you have any recollection of a conversation that you had with Mr. Schuman on that topic in October 1971?

A No, I don't.

Q Do you recall, sir, that on March 17, 1972 you appeared before the New York Stock Exchange for questioning?

A Yes.

Q Do you recall being asked this question, at page 24:

"Q Okay. Now, in your conversation that morning, was any mention made of earnings figures of the firm?

"A No. The fact of the matter is that Bausch & Lomb has not discussed earnings with me since I began following the stock. B&L has been very

leery about discussing earnings, largely because the company is developing, has been developing a new format with a new product, which was on a very difficult to perceive growth curve."

It goes on.

Do you remember that?

A Do I recall this testimony? No, I don't.

Q But, whatever you said to the New York Stock Exchange, was that the truth to the best of your knowledge at the time you gave it, on March 17, 1972?

A Yes, sir.

Q Do you remember in that same appearance before the Stock Exchange, page 29, you said, referring to a discussion that you had with Mr. Hoitsma, and this is your part of the answer I want to read you:

"I would suspect that Dan Schuman"--

MR. GREENSPOON: Wait a minute. Is there a question?

Q Do you remember stating this:

"I would suspect that Dan Schuman probably produced the standard Bausch & Lomb answer, which was, 'We will not talk about earnings'"?

MR. RUSCH: Wait a minute, Mr. MacCallum.

That is unfair and you know it. That statement is taken out of context. What is the first phrase appearing in front of that, in the beginning of the sentence?

MR. LIMAN: I will read the whole thing, but your Honor will see why --

THE COURT: Let me see the transcript.

MR. LIMAN: Read the whole thing, your Honor.

(Handing.)

It is the end of that page, going on to the next.

(Pause.)

THE COURT: I have read the entire comment of the witness beginning two-thirds of the way down page 28 and continuing on to the top of 29 through five lines. And I might suggest that testimony or statements like "This is my presumption, but I would suspect that Dan Schuman probably produced the standard Bausch & Lomb answer, which was 'We will not talk about earnings, and that is only a presumption, but that is the way it had been for a year prior to this' is not, in my judgment, dispositive of the matter.

BY MR. LIMAN:

Q Well, Mr. MacCallum, was the standard Bausch & Lomb answer to questions concerning earnings- before you received your telephone call from Mr. Schuman the afternoon of the 16th, "We will not talk about earnings."?

MR. GREENSPOON: Objection, sir, unless he --

THE COURT: Sustained. The word "standard," among other things, is going to create trouble.

Q Had you been told by Mr. Schuman before March 16 that he would not talk about earnings?

A I don't recall his specifically telling me that. But certainly his manner in --

THE COURT: All right. You don't recall his specifically telling you that.

Next question.

Q You say you don't recall now. Did you describe the standard response from Mr. Schuman when you appeared before the New York Stock Exchange the day after this event as being "We will not talk about earnings."?

A I don't recall that.

Q Does that refresh your recollection in

any way that when you raised the subject of earnings with Mr. Schuman, up to the point of that telephone call in the afternoon his responses were that he would not talk about them?

A It certainly refreshes my recollection of the fact -- of his difficulty in talking about -- the fact that he would not talk about earnings of the company, yes.

Q And is it a fact that when you got that telephone call from him the afternoon of the 16th and he gave you a figure for Bausch & Lomb's estimate of earnings that you were surprised by that?

A I was astonished by it.

Q It was aberrational in terms of your dealings with him?

THE COURT: Sustained.

MR. GREENSPOON: Objection.

MR. LIMAN: I have no further questions.

THE COURT: Is there any redirect?

MR. RUSCH: May I confer with co-counsel for a minute, your Honor?

THE COURT: Yes.

(Pause.)

MR. RUSCH: We have no further questions.

Securities and Exchange Commission

vs 73 Civ 2458 (RJW)

Bausch & Lomb Incorporated and Daniel G. Schuman

April 1, 1976
New York, N.Y.
9:40 a.m.

(Trial resumed.)

THE COURT: Good morning, everyone.

You may proceed.

MR. LANG: The Government calls Mr. Sheldon Greenberg.

S H E L D O N G R E E N B E R G, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LANG:

Q Mr. Greenberg, where are you employed?

A Investors Diversified Services, Minneapolis, Minnesota.

Q And what is your position there?

A A senior securities analyst.

Q How long have you been a securities analyst with IDS?

A Eight years.

Q And as a securities analyst do you have

Q Directing your attention to March 16, 1972, did you have any discussions regarding Bausch & Lomb on March 16, 1972?

A Yes.

Q Did you receive a telephone call from Mr. Howard Bille of Faulkner, Dwight & Sullivan on that date?

A Yes.

Q What was the first time that you talked to him about Bausch & Lomb on that day?

A Some time right before lunch Minneapolis time.

Q What did he say to you?

THE COURT: At that time of the year Minneapolis time was one hour different from New York?

THE WITNESS: Yes.

MR. KAPLAN: I object.

THE COURT: Obviously there is a hearsay objection. I assume that you are not offering this conversation for the truth of the matter asserted?

MR. LANG: That is correct.

THE COURT: If so I will take it. I assume it is being offered as proof of this witness' state of mind subsequent to when he did something.

Is that the thrust of what you are doing?

MR. LANG: That is correct, your Honor.

THE COURT: All right, I will take it but not for the truth of the matter asserted.

MR. KAPLAN: Frankly, I don't see the materiality or relevance of this witness' state of mind who by now is hearing things about fourth-hand.

THE COURT: But it would seem to me that at a minimum the Government could introduce proof that he received a telephone call from Mr. Wille and as a result of that call he did something.

We know pretty much what is coming and under the circumstances I am going to let it come in but I will not take the substance of the call for the truth of the matter asserted.

MR. KAPLAN: May I have a voir dire?

THE COURT: Certainly.

VOIR DIRE EXAMINATION

BY MR. KAPLAN:

Q Mr. Greenberg, following the telephone call from Mr. Wille did you do anything with respect to Bausch & Lomb stock?

A What do you mean do anything?

Q Did you buy or sell?

THE COURT: Or make any recommendation within your own firm to do so?

A No.

THE COURT: Very well.

MR. KAPLAN: I renew the objection.

THE COURT: Let's leave it to the Government as to what the probative value of this would be.

MR. LANG: This phone call that we are discussing right now is the first of a series of phone calls that Mr. Greenberg had during the day, March 16, some of which he initiated because of this phone call from Mr. Wille. The phone call he had with Mr. Wille, Mr. MacCallum and the phone call he had with Mr. Schuman culminated with a decision within his own organization with respect to Bausch & Lomb stock that afternoon.

THE COURT: The question is in my mind did he do anything? If they didn't I think you really should move on to the conversation that he had with Mr. Schuman.

I just don't see the other. I think you could establish through him that he got this information while it was still inside and then did something,

he bought, sold. Remember, they were withdrawing their buy recommendation and obviously if he did something I would find it to be probative here.

I will hear from you on that.

MR. LANG: We could also show that he did not do something in response to that information.

THE COURT: That gets a little tacky.

MR. LIMAN: Do they want to concede -- they can't have it both ways.

THE COURT: I have to agree with that. You see, I thought this was coming in as a prelude to IDS selling before the news of the lower earnings became more public or something like that. I am talking out loud.

I don't see the relevance of hearsay conversation as to his state of mind unless it caused him to do something.

Now, true, you will tell me about a conversation he had with Mr. Schuman but you could ask him about a conversation with Mr. Wille and thereafter with Mr. MacCallum -- yes, I did. As a result of those conversations did you do something? Yes, I did. What did you do? Call Mr. Schuman, and tell about the conversation. They are not

going to object to any of that.

MR. LIMAN: Absolutely.

THE COURT: Fine.

You had a telephone call with Howard Wille?

THE WITNESS: Yes.

THE COURT: Of Faulkner, ~~Dwight~~ Dawkins & Sullivan?

THE WITNESS: Yes.

THE COURT: What time was that?

THE WITNESS: I believe about 11 o'clock Minneapolis time.

THE COURT: If I recall in March about noon New York time?

THE WITNESS: Yes.

THE COURT: Very well.

Now, just follow that track.

BY MR. LANG:

Q Subsequent to the phone conversation with Mr. Wille did you have a phone conversation with Mr. MacCallum?

A Yes.

Q After your phone conversation with Mr. MacCallum --

THE COURT: About what time did you speak with Mr. MacCallum?

THE WITNESS: This is pretty rough, 1 o'clock Minneapolis time.

THE COURT: Transposing it that would be about 2 o'clock or thereabouts New York time?

THE WITNESS: Right.

THE COURT: Did you call him or did he call you?

THE WITNESS: He called me.

Q Subsequent to your phone conversation with Mr. MacCallum did you speak to Daniel Schuman?

A Yes.

Q Did you call him or did he call you?

A I called him.

Q About what time was that?

A It would have been about 1.30.

Q Minneapolis time?

A Yes.

THE COURT: I will transpose that again to about 2.30 New York time?

THE WITNESS: I believe.

Q During that phone conversation with Mr. Schuman what did he say to you and what did you say to him?

A I called him to --

THE COURT: Just tell us the conversation.

A I said that I understood an analyst had been up to see him that morning and that he had said, Mr. Schuman said that earnings for the first quarter will be roughly 65 to 75 cents in the quarter.

I told him that that was somewhat disappointing to me and seemed as though sales were not going as well as I had felt he indicated in our February 2nd meeting.

He said that was true but that he felt there had been some negative publicity in the press, et cetera, but he felt strongly that sales would get better and that he also recited there were many other things they were going to do to try to improve sales such as coming out with the minkits again.

He felt they would be getting into foreign markets. Also indicated that most of the contact lens sales occurred during the summer months and that he felt they were coming into the time of the year when those sales would pick up.

Q Did he tell you that the earnings for the first quarter were to be in the range of 65 to 75 cents?

A Yes.

Q Subsequent to your phone conversation with Mr. Schuman did you have a meeting with IDS with respect to Bausch & Lomb?

A Yes.

Q Who did you have that meeting with?

A Mr. Gene Sit and Mr. Robert Healy, portfolio manage rs of two funds that held Bausch & Lomb stock.

Q What if any decision was made at that meeting with respect to Bausch & Lomb stock?

MR. KAPLAN: Objection.

THE COURT: I am going to take it.

What time was the meeting?

THE WITNESS: About 2 o'clock Minneapolis time.

THE COURT: Again, transposing that it would be about 3 o'clock New York time?

THE WITNESS: I believe that is so.

THE COURT: Do you recall whether or not the meeting began at a time when the New York Stock Exchange was still open?

THE WITNESS: I really don't know exactly. I believe it was right after it closed.

MR. LANG: Will you read back the last

question, please.

(Question read.)

THE COURT: Yes, I will take it. The word decision bothers me but I might as well get the information and we will deal with it.

What if anything happened relative to IDS' position in Bausch & Lomb stock on March 16 following that morning?

A Well, we first of all decided that this information was not generally available so that we couldn't act on it even if we wanted to.

We then discussed what the longer term implication of this would be and would we conceivably want to sell the stock at a future time when we felt this information was generally known.

We felt at that time that while there might be a short-term negative reaction to the stock, that longer term we felt the outlook was still good and that we could continue to hold our position.

MR. LANG: I have nothing further, your Honor.

THE COURT: We will proceed with the cross-examination.

CROSS EXAMINATION

BY MR. SMITH:

Q Mr. Greenberg, in your business as a security analyst with IDS have you called on a number of other companies other than Bausch & Lomb?

A Yes.

Q In the entire eight-year period you have been an analyst?

A Yes.

Q Can you estimate how many companies you have called upon?

A 60.

Q Had you had any contact, direct contact with Bausch & Lomb prior to February 2, 1972?

A Yes.

Q How many occasions have you had contact with Bausch & Lomb prior to that?

THE COURT: Prior to February 2nd when you met with Mr. Schuman.

A I think I had one prior meeting with Mr. Schuman approximately a year earlier, I believe January of 1971.

Q In either that meeting or the meeting on

February 2nd had Mr. Schuman ever given you an earnings estimate?

A No.

Q Had he given you an earnings estimate for Soflens, sales or earnings?

A No.

Q In your dealings with other --

THE COURT: Can I follow that for a moment?

MR. SMITH: Surely.

THE COURT: I know you said you were covering Bausch & Lomb during February 1972. Did you continue to cover Bausch & Lomb subsequent to March of 1972 for IDS?

THE WITNESS: To about the end of that year.

THE COURT: Did you have any subsequent dealings with either by personal conversation or by phone with Daniel Schuman?

THE WITNESS: After March 16? No.

THE COURT: Did you have any personal dealings either on a face-to-face bais or by telephone with anyone else at Bausch & Lomb for the balance of 1972?

THE WITNESS: No.

MR. SMITH: Your Honor asked my questions and I appreciate that.

THE COURT: I didn't mean to but I thought it was relevant and I thought you were moving on to a different subject.

BY MR. SMITH:

Q In your conversations with other companies, had other companies discussed with you earnings estimates during this period?

MR. GREENSPOON: Objection, sir, to this inquiry.

MR. SMITH: If your Honor please --

THE COURT: I will take it.

A I would like to hear the question again.

THE COURT: Surely.

Read the question, Mr. Reporter.

(Question read.)

MR. SMITH: Let me rephrase it.

Q Had other companies that you called upon during this period discussed with you earnings estimates either in terms of specific figures or confirming ball park estimates?

A I would have to say yes.

Q Was that the practice as far as your knowledge was concerned of this business, the business of security analysts?

MR. GREENSPOON: Objection to that, sir.

THE COURT: Do you know what the practice was or was there a practice regarding --

THE WITNESS: I don't think you can say there was a practice.

THE COURT: I didn't think so.

Next question.

Q Going back to the first quarter of 1972, had you been following the newspaper articles on Bausch & Lomb?

A Yes.

Q Had you been reading the Wall Street Journal on a daily basis during that period?

A Yes.

Q Did you see articles in the Wall Street Journal that raised the question of contamination for Bausch & Lomb?

A Yes.

Q Were there many of them?

MR. GREENSPOON: Objection. I don't know what many means.

THE COURT: More than one?

Q Were there more than one?

A I don't recall.

Q Did you reach a conclusion from seeing those articles in the press as to whether or not they might have an impact on Bausch & Lomb sales of its Soflens products?

MR. GREENSPOON: Objection to this.

THE COURT: It is just yes or no at this point and then see where we are going.

THE WITNESS: May I have the question?

(Question read.)

A Yes.

Q What was that conclusion?

A That it could possibly have, probably impede sales somewhat.

THE COURT: If I may inquire, you indicated that IDS had what I think is a rather substantial position in Bausch & Lomb, 100,000 or more shares.

Was that position for investment or for investment or for any other purpose or didn't you have a purpose?

I am thinking whether it was invested

on a short term, long-term basis or had no purpose at all? I know you have been talking about long-term.

THE WITNESS: Well, your Honor, we first of all, we have about eight or nine different funds and each fund has a different objective.

Some are for longer term, most are for longer term. The two funds which held this stock were mostly for longer term types of investments.

Q I believe you testified that you had a conversation with Mr. Schuman on February 2nd?

A Yes.

Q There was some discussion as to whether the first quarter was going to be good or whatever the comparison would be with respect to the fourth quarter.

Was it your testimony that your conclusions were drawn from that conversation?

MR. LANG: Objection.

THE COURT: Sustained as to form.

Q Was the testimony that you gave prior in your direct examination a quotation of Mr. Schuman or did it represent the conclusions or impressions that you drew from that conversation?

MR. LANG: I object, your Honor. I think the testimony speaks for itself.

THE COURT: I will take it. He never quoted Mr. Schuman and I had the distinct impression of what it was but I am willing to let counsel inquire.

Let us have the question read back to the witness.

(Question read.)

A Impressions I drew from the conversation.

Q In fact, you indicated the conversation was an hour long and I believe the testimony lasted about five minutes about that conversation.

MR. LANG: I move to strike that.

THE COURT: Yes, you are testifying. The Court is aware of two facts in the record. The witness testified that the meeting was about an hour long and the witness also was aware and the transcript will reflect about how long the testimony took in connection with the meeting.

I would suggest it did not take anything like an hour and was considerably less and let's leave it at that.

Q Let's go on to March 16th.

You had your conversation with Mr. Schuman and talked about his having an estimate of 65 to 75 cents and apparently that was given out to an analyst.

Were you surprised to learn that Mr. Schuman had given an earnings estimate to an analyst?

A Yes.

MR. GREENSPOON: Objection to that, sir.

THE COURT: Well, now, let me suggest this. We are getting into states of mind. I want to know. He says he was surprised that that had been given out to an analyst.

MR. GREENSPOON: Did he say that? I think, your Honor, he said that --

THE COURT: That is what I heard: "Yes."

Did I hear "Yes," Mr. Reporter?

THE REPORTER: Yes.

MR. GREENSPOON: Just now?

THE COURT: I did.

MR. GREENSPOON: Well, you are closer to him. I thought he was referring to what he had said at the time that he spoke with Mr. Schuman. I did not hear this, "Yes."

THE COURT: Let me have the question and answer repeated.

(Record read.)

THE COURT: Do you want it stricken, Mr. Greenspoon?

MR. GREENSPOON: Yes, sir.

THE COURT: I am going to let it stand.

BY MR. SMITH:

Q Why were you surprised?

A I guess for several reasons. First of all, in my previous dealings with him he had never given out any estimates before. And --

MR. GREENSPOON: Excuse me, your Honor. I assume he means he had never given any estimates to him.

THE WITNESS: To me, yes, or that I had heard about before.

THE COURT: Yes; either directly or that he had heard about.

MR. SMITH: Thank you.

THE COURT: I don't think the witness is finished.

MR. LANG: He is completing his answer.

A (Continuing) And that this was just

generally not done by anybody at any company. So I was just surprised that it had been done.

THE COURT: Did you engage him in conversation in that regard?

THE WITNESS: Not specifically.

Q You indicated that later on on the 16th you decided not to sell your stock, either immediately or in the future, is that correct?

A A group of three of us decided that.

Q Within the next ten days, did you make a recommendation that IDS buy Bausch & Lomb stock?

A I don't know about the exact time period, but it was sometime within the next couple of weeks, I believe.

MR. SMITH: May we have this marked for identification?

(Defendants' Exhibit 00000 marked for identification.)

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MR. LANG: Your Honor, could we see that?

MR. SMITH: Surely.

(Handing.)

(Pause.)

Q I show you what is marked as Defendants'

Exhibit 00000 for identification. Take a look at that, please, and read that document.

A I remember it.

Q Does Defendants' Exhibit 00000 refresh your recollection as to the date upon which you recommended the purchase of stock?

A Yes.

Q And what was that date?

A The date on there. March 27th.

Q And can I ask you, upon what basis did you decide to purchase the stock? What was the basis of your recommendation?

A I think the principal basis of this recommendation was on a price basis.

Q And what was the price of the stock at that time?

A 119-1/4.

Q Did you base the recommendation on any expectation as to the earnings of Bausch & Lomb?

MR. GREENSPOON: Your Honor, he just answered the question as to why he bought it. The basis was that the price was 119-1/4.

THE COURT: Well, I think I know what he is getting at and I'm going to let him ask it.

A Well, earnings are always taken into consideration in buying stock.

THE COURT: Of course. I think we all understand that. If the price was down and the earnings were terrible and the prospects were terrible, I don't think you would make this type of a recommendation, would you, sir?

THE WITNESS: No.

THE COURT: All right.

Q Does that document refresh your recollection as to what you felt about earnings, both near term and long term?

MR. LANG: Objection, your Honor. He hasn't asked him whether he has a recollection.

THE COURT: Sustained. You have to go back one question.

Q Do you have a recollection as to whether or not you had an opinion, both near term and long term, as to the earnings prospects of Bausch & Lomb?

A I always have an opinion at the time, because I have to have something stated.

Q Do you recall what that opinion was?

A It is stated right here.

MR. GREENSPOON: Independent of that,

though.

Q Independent of that, before showing you that document, do you recall what it is, what your opinion was?

THE COURT: Or even now that you have seen it, did you have an opinion and, if so, what was it, about earnings?

A You mean relative to the current estimate at that time?

Q That's right.

What was your opinion as to near term and long term earnings of Bausch & Lomb at that time?

A Well, my best estimate at the time was a matter of record, and longer term I obviously felt they were going to be quite good or I wouldn't have recommended the stock.

Q Did you attribute the recent slowdown in retail sales of Bausch & Lomb Sofens to the constant flow of negative articles concerning the new Soflens?

MR. GREENSPOON: Objection, sir, until it has been shown that he knew that there was a recent slowdown.

THE COURT: Yes. Sustained. The question is objectionable. You may rephrase it.

Q As of March 27, 1972, were you aware that there had been a slowdown in the sales of Bausch & Lomb Soflens?

A I would say yes.

Q You had been reading the Wall Street Journal throughout this period?

A Well, that would be one thing. And the other thing would be that the earnings estimate that was given out on the 16th was less than we had been looking for.

Q Did you reach any conclusion as to what the cause of that was, that recent slowdown?

A This certainly would be one of the things.

(Indicating)

Q And what is that?

A The negative publicity in the press.

Q And that is the same negative publicity that you have testified to had been in the Wall Street Journal, about contamination?

A Yes. That was just one thing.

THE COURT: Well, now, at this point,

March 27th, there was some other publicity in the press about the company, wasn't there?

THE WITNESS: I guess I don't recall now.

THE COURT: All right.

Q Do you recall seeing newspaper articles with headlines about the SEC investigation into the Bausch & Lomb stock?

A I did.

Q You did.

Was that in the Wall Street Journal?

A (No response.)

Q Was it in the Minneapolis papers?

A Yes. We get most of the same news, even though it might be one day late.

Q Do you know whether or not, based upon this recommendation, IDS did in fact buy stock in Bausch & Lomb after this recommendation?

A I believe they did.

Q Do you know approximately how much stock that was?

A I don't recall. You have got --

MR. GREENSPOON: I move to strike that.

THE COURT: "I don't know" is the answer.

But he says that they bought it.

MR. GREENSPOON: No, your Honor. He said something about "You have" --

THE COURT: I think he intended to say "You have the numbers."

MR. GREENSPOON: That is what I thought.

THE COURT: But I don't see that the numbers are material. They bought, period.

Was the purchase by those same funds?

THE WITNESS: No, another fund.

THE COURT: What sort of fund was that? What was its objective, if I may inquire?

THE WITNESS: Well, the objective of this fund is more as a trading fund.

BY MR. SMITH:

Q Do you recall approximately how many shares? Was it thousands of shares?

A Yes.

MR. SMITH: I have no further questions.

A (Continuing) Many.

THE COURT: Many thousands of shares.

CROSS EXAMINATION

BY MR. KAPLAN:

Q Good morning, Mr. Greenberg.

A Good morning.

Q You testified on direct that you spoke to Mr. MacCallum at about 2:00 o'clock New York time on March 16, '72, is that right?

A I believe that is right.

Q And that you spoke to Mr. Schuman at about 2:30?

A Right.

Q Do you remember those times with precision?

A No, I do not.

Q It could have been off a little bit one way or the other?

A Yes.

Q And both calls might have been as much as 15 or 20 minutes later, is that right?

A Yes.

Q Now, sir, you were aware, in the first quarter of 1972, that Bausch & Lomb was introducing, or had introduced, the Soflens to optical practitioners through a series of introductory seminars in 1971, correct?

A Yes.

Q And you knew that those seminars had ended in November of 1971, correct?

A Yes.

Q And you knew that no further seminars were being held of the same type in the first quarter of 1972, correct?

A Not correct. I wasn't sure of that. I don't recall that I knew that.

Q You don't recall that you knew that.

A No.

Q Did you, during the first quarter of 1972, follow Bausch & Lomb's press releases?

A Yes.

Q I show you a document, Defendants' Exhibit NNN, and I will ask you if that refreshes your recollection as to whether you knew in the first quarter of 1972 that the Soflens Symposia had ended in November of 1971.

A I must say I don't specifically recall this document, but I am certain I must have gotten that.

MR. KAPLAN: Your Honor, the document is in evidence and, if I may, I simply invite your attention to the first paragraph --

MR. LANG: Could you give me the number reference, please?

MR. KAPLAN: Defendants' Exhibit 66 -- to the first paragraph on the second page.

(Handing.)

THE COURT: This is a release dated October 19, 1971, is that right, Mr.Kaplan?

MR. KAPLAN: Yes, sir.

THE COURT: Very well.

Q Now, Mr. Greenberg, you did expect, in the first quarter of 1971, that Bausch & Lomb's kit sales of Soflens would fall off?

A '72?

THE COURT: '72, I believe.

MR. KAPLAN: I will restate the question.

Q You did expect, in the first quarter of 1972, that Bausch & Lomb's kit sales of Soflens would fall off from the last quarter of '71 because of the end of the introductory symposia, correct?

A Yes.

Q And that is what you referred to as "pipelining" earlier, is that right?

A Yes.

Q So when Mr. Schuman told you on February 2, 1972 that Soflens earnings would be somewhat less in the first quarter of 1972 than in the fourth

quarter of 1971, that was not news to you, was it, sir?

A No.

Q Now, after Mr. Schuman told you, on February 2, 1972, that Soflens' earnings in the first quarter would be somewhat lower than in the first quarter of '71, you increased your estimate of Bausch & Lomb's earnings, correct?

A Yes.

Q And after you learned that Bausch & Lomb's earnings estimate for the first quarter of '72 was still lower than you had previously thought on March 16th, you then bought Bausch & Lomb stock, correct, for IDS?

A Several weeks later.

Q Well, March 27th.

A Yes.

Q Now, sir, on March 16th, after you spoke to Mr. Schuman, you met with Mr. Sit and Mr. Healy, correct?

A Yes.

Q You met with those gentlemen, sir?

A Yes.

Q And at that meeting you expressed some

sensitivity about the nature of the information you received from Mr. Schuman?

A Yes.

Q And the three of you concluded that the earnings estimate that you had gotten from Mr. Schuman was inside information, correct?

A Yes.

Q And you decided that you couldn't trade on that information, correct?

A Well, yes, even if we wanted to.

Q Even if you wanted to.

A That's right.

Q And you had never prior to that occasion received any information from Bausch & Lomb which you regarded as inside information, is that right?

A Yes.

MR. KAPLAN: Thank you, sir. No further questions.

MR. LANG: We have no redirect, your Honor.

THE COURT: You may step down. Thank you.

(Witness excused.)

MR. RUSCH: Your Honor, the Commission

jgrf 15

calls Mr. Gary Burkhead.

J A M E S G A R Y B U R K H E A D, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUSCH:

Q Mr. Burkhead, how are you presently employed?

A I am a member of Smith, Barney, Harris, Upham. I am the Manager of the Research Department at Smith, Barney, Harris, Upham and a First Vice-president of that firm.

Q And how were you employed in February and March 1972?

A I was a securities analyst in the Research Department of Smith,Barney, and a Vice-president of the firm. At that time I was covering the medical, drug and cosmetic industries.

Q In your coverage, did you follow Bausch & Lomb?

A Yes, I did.

Q Directing your attention to February 24, 1972, did you have occasion to speak to anyone at Bausch & Lomb concerning earnings prospects

for the first quarter?

A Yes, I did.

Q Would you please describe that conversation and who it was with?

A I had a conversation on February 24th with Mr. Jack Harby.

Q Who is Mr. Harby?

A Mr. Harby was President of Bausch & Lomb at that time.

I had talked with Mr. Harby regarding an internal memorandum that I had written on the 23rd and 24th regarding an article that had appeared in the Wall Street Journal of February 23rd on the possibility of a soft contact lens to be produced by duPont.

I went over the points in that All-Office Wire, or internal memorandum, with Mr. Harby to check as to their accuracy with regard to my responses to the points made in that Wall Street Journal article.

At the conclusion of that discussion of that All-Office Wire, I asked Mr. Harby how business was. Mr. Harby said that sales of the Soflens had slowed somewhat recently.

I asked the reasons for the slowdown. He indicated, or he said, at the time that he believed it was due to temporary seasonal factors.

I asked then if that would result in earnings not being up to expectations for the first quarter. He said that he didn't believe that it would, that the earnings for the first quarter depend importantly on the introduction and shipment of aphakic lenses. The aphakic lenses are for those post cataract patients.

I asked if he believed that he would be able to meet that delivery schedule. He said that he believed he would.

Q Was there any further discussion concerning earnings prospect for the first quarter in that conversation?

A No, there was not.

Q Did there come an occasion on February 28, 1972 --

THE COURT: Was there any further discussion at that time relating to figures or projected figures of sales, either present or future?

THE WITNESS: No, your Honor.

Q Directing your attention now to February

29, 1972, did you have occasion to speak with someone, anyone, at Bausch & Lomb concerning earnings prospects for the first quarter?

A Yes, I did.

Q Who was that conversation with?

A That conversation was with Mr. Jack Harby.

Q And would you please describe that conversation?

THE COURT: Was it in person or on the phone?

THE WITNESS: On the telephone.

THE COURT: Your initial conversation, the one you just referred to on February 24, I had gathered that that was in person. Was it?

THE WITNESS: No, sir. That was also on the telephone.

THE COURT: Very well.

A Late in the afternoon of February 29th I called Mr. Harby to review the contents of an All-Office Wire that I had prepared on the 28th and 29th for distribution late on February 29th. This All-Office Wire contained the reasoning for my withdrawing Bausch & Lomb from our recommended list. This is

a list of recommended securities published within our organization.

One paragraph in that All-Office Wire referred to my estimate for earnings for Bausch & Lomb in the first quarter of 1972.

MR. KAPLAN: Excuse me, your Honor. The document to which he refers is in evidence and, rather than have the witness testify to the contents, I think we should refer to the document.

THE COURT: Would you state the number at this point or letter.

MR. RUSCH: ZZ, your Honor.

Thank you, Mr. Kaplan. I appreciate that.

THE COURT: All right. You may proceed.

Q Directing your attention now to what has been introduced in evidence as Defendants' Exhibit ZZ, is that the document you just referred to?

A Yes, it is.

Q And would you point out, reading the first line, which paragraph you brought to Mr. Harby's attention?

A Well, I --

MR. KAPLAN: Objection, your Honor. I don't believe he said that he brought any particular

paragraph to his attention.

THE COURT: I thought he said he talked about one particular paragraph. But let's go back one question.

Did you discuss any portion of your draft memorandum with Mr. Harby?

THE WITNESS: Yes, sir. I discussed the entire memorandum with Mr. Harby. I read him the entire memorandum and --

Q Now directing your attention to that portion of your memorandum which concerns earnings, was there any discussion concerning that particular paragraph?

A Yes, there was discussion of that paragraph.

Q Would you read that paragraph for the record?

A "These cross currents will play a significant role in our first quarter comparison. If the aphakic lenses are introduced early enough in March, we think that there is a good chance that earnings will match the $1.02 per share earned in the fourth quarter of 1971. If not, earnings for the quarter might be closer to 80 to 85 cents per share.

Earnings were 27 cents per share in last year's first quarter before restatement to reflect the acquisition of Buschnell Optical.

"However, for the year as a whole we think the positive factors will be predominant and we continue to estimate $5 to $7 per share. "

Q And would you please describe what, if anything, was said concerning that paragraph with Mr. Harby? What did you say to him and what did he say to you?

A I believe I asked Mr. Harby if that were a fair statement of circumstances at the time and --

Q Had you read that paragraph to him over the phone?

THE COURT: He said he read the entire document.

A I read the entire document.

Q Thank you.

A And he said that it was.

Q Was there any further discussion concerning the earnings information as it appeared in your wire report?

A No, there was not.

Q Now directing your attention to the day

of March 16th, 1972, did you have occasion to meet with Mr. Daniel Schuman of Bausch & Lomb?

A Yes, I did.

Q And who was Daniel Schuman at that time?

A At that time Daniel Schuman was Chairman of Bausch & Lomb.

Q And when did you meet with Mr. Schuman on that date?

A Beginning at approximately 2:15 that afternoon through late in the afternoon.

MR. RUSCH: Excuse me, your Honor. If I may go back to this exhibit.

Q Directing your attention to a conversation you had with Mr. Harby on February 29, 1972, did you have that conversation with Mr. Harby prior to issuing what has been marked as Exhibit ZZ to any of the customers of Smith Barney?

A Please repeat the question, if you will.

(Question read.)

A Yes, I did.

Q Prior to February 29, 1972 had you ever personally met Mr. Harby?

THE COURT: You didn't meet him on that day if my memory serves me correct.

Did there come a time when you ever met Mr. Harby?

THE WITNESS: Yes, on March 16.

THE COURT: Was that the first time you met him?

THE WITNESS: Yes.

THE COURT: You met with Mr. Schuman that day. Was that the first time you ever met Mr. Schuman?

THE WITNESS: No, sir.

THE COURT: When had you met him previously or seen him previously?

THE WITNESS: I met Mr. Schuman the first time in April of 1971. I met him again in July of 1971 and one other time in December of 1971.

THE COURT: This was the fourth time you met Mr. Schuman?

THE WITNESS: Yes, sir.

Q How long did your meeting last with Mr.

Schuman on March 16, 1972?

THE COURT: I think he said from 2.15 to the late afternoon.

MR. FUSCH: I didn't hear that, your Honor. I am sorry.

Q During the course of your meeting with Mr. Schuman did any discussion come up concerning a press release?

A Yes.

Q Would you please relate what that discussion was?

A Yes, sir.

At some point in the afternoon, and I do not recall exactly when, I suggested to Mr. Schuman that he consider contacting his financial public relations firm and possibly getting out a press release.

Q Why did you make that suggestion to Mr. Schuman?

A I felt that that afternoon I had heard information that was important and that I considered it desirable to try to get the broadest possible dissemination of that information.

Q This is information you heard from Mr.

Schuman during the course of the meeting?

A Yes, sir.

Q What was that information that you heard?

A The information --

MR. KAPLAN: Excuse me, your Honor. To avoid any possible confusion perhaps the question ought to be phrased in terms of just what Mr. Burkhead heard before he made that comment.

THE COURT: And to whom. I think that is correct. It would be more precise.

MR. RUSCH: Your Honor, I think I am entitled to extract from the witness what information he heard that afternoon and what prompted him to make the suggestion.

THE COURT: Yes, that is all right.

MR. RUSCH: I don't mean to go into the entire meeting.

THE COURT: But I would like to know what Mr. Burkhead heard the afternoon we have spoken of. You indicated that you heard some information and some estimates from someone which caused you to make the suggestion to Mr. Schuman that he communicate with his public relations firm and that a press release be prepared.

Would you go back and tell us when and from whom you first heard this information and tell us in words or in substance the information that you heard.

THE WITNESS: The precise answer to the question is somewhat difficult because of my not being able to recall the precise t~~e~~ming of the suggestion itself.

I had heard that earnings for the first quarter would be somewhere in the 65 to 75-cent a share range.

Q Who did you hear that from?

A I overheard that being said by Mr. Schuman.

THE COURT: Were you in or outside his office at the point of overhearing this conversation?

THE WITNESS: I was in his office.

THE COURT: You said you overheard it which would indicate to the Court that he was not addressing you at that time?

THE WITNESS: That is correct.

THE COURT: You were in his office, he was in the office. Who else was in the office at

that time?

THE WITNESS: No one else was in his office.

THE COURT: Just tell us the circumstances under which you overhead Mr. Schuman make whatever statement he made regarding these earnings?

THE WITNESS: As best I recall I overheard this information first in a conversation between Mr. Schuman and Mr. MacCallum. This was a telephone conversation.

THE COURT: What did you hear? You were not on some extension phone so it was not the speaker on the phone so I assume what you heard came out of Mr. Schuman's lips.

THE WITNESS: That is correct.

THE COURT: Tell us in words or in substance what he said, please.

THE WITNESS: Mr. Schuman had placed a call to Mr. MacCallum. This was after a previous call with Mr. MacCallum.

THE COURT: Did you overhear the previous Schuman end of the first MacCallum call?

THE WITNESS: Yes, I did.

THE COURT: And you moved to the second

call?

THE WITNESS: Yes.

THE COURT: Go ahead.

THE WITNESS: And Mr. Schuman indicated that it appeared that first quarter earnings would be more in the range of 65 to 75 cents a share.

Q What additional information prompted you to suggest the press release?

THE COURT: If any.

A As best I remember there were other factors relating to the first quarter result that prompted this. That is the delay in the shipment of the aphakic lenses.

The fact that the smaller fitting kits, that is the lenses to be used for cosmetic purposes, were not to get out before the end of the first quarter.

The flattening out of the consumer sales during February, March period, and the delay in shipments that resulted from the problem with the vial seals.

Q This was information you had heard from Mr. Schuman during the course of the meeting?

A Yes, that is correct.

Q What did Mr. Schuman say in response to your suggestion concerning the press release, if anything?

A Mr. Schuman indicated again at some point in the afternoon that he felt he had disseminated the information through his contact with Dan Dorfman.

MR. RUSCH: The Commission has no further questions.

CROSS EXAMINATION

XX

BY MR. KAPLAN:

Q Mr. Burkhead, you testified that among the factors that prompted you to make your comment to Mr. Schuman about a press release was that you overheard him saying that the consumer sales had flattened in February and March, true?

A That is correct.

Q Mr. Harby told you much the same thing in February of 1972, correct?

MR. RUSCH: I object to the characterization as to much the same thing.

THE COURT: Yes, much the same thing makes the question objectionable and therefore you have to rephrase it.

Q In February of 1972, Mr. Burkhead, Mr. Harby told you that the Soflens sales flattened?

MR. RUSCH: There were two conversations in February.

MR. KAPLAN: That is fine, Mr. Rusch.

THE COURT: During February, I don't care which one.

MR. KAPLAN: I don't care either, your Honor.

Q Mr. Harby told you that the Soflens sales flattened in February 1972, true?

A In February of 1972 Mr. Harby said that sales of Soflens had slowed somewhat.

Q Did you suggest to Mr. Harby that he issue a press release about that?

A No, I did not.

Q Now, sir, you followed Bausch & Lomb press releases during this period, correct?

A Correct, I did.

Q On or about March 1st, 1972 did you have occasion to see a press release in which Bausch & Lomb announced that there had been an interruption of shipments of Soflens?

A I saw a comment on the Dow Jones broad

tape on March 1st.

Q Nevertheless, one of the reason you suggested to Mr. Schuman that he issue a press release on March 16 was because he told you that there had been an interruption of shipments which had already been published in a press release on March 1?

MR. RUSCH: I object to the question, your Honor. The form of the question nevertheless.

THE COURT: All right.

Rephrase it.

Q So that one of the reasons you suggested to Mr. Schuman that he issue a press release on March 16 is because you overheard him saying that there had been an interruption of Soflens shipments, correct?

A Correct.

Q You had seen a press release on or about March 1 or a report of a release which disclosed this information?

A Correct.

Q Prior to March 16, 1972, had Mr. Schuman ever disclosed to you Bausch & Lomb earnings estimates

rs 10 Burkhead - cross

for any quarter or any year?

A No, he had not.

Q I believe you testified that Mr. Schuman told you that Soflens sales had flattened, right?

A Yes.

Q Now, that wasn't news to you either, sir, was it, on March 16?

A The news that -- or the information that Soflens sales had flattened in February and March I would differ with the knowledge that Soflens had slowed during that period.

THE COURT: In other words, you draw a distinction between the words slowed somewhat and the word flattened?

THE WITNESS: Yes, sir.

THE COURT: Of course, as I understand it previously you hadn't heard any company numbers had you?

THE WITNESS: That is correct.

Q On January 17, 1972 you issued a report over an All-Office Wire on Bausch & Lomb, correct?

A Yes, sir.

Q In that report you stated as follows: "In spite of the fact" --

THE COURT: Is it in evidence?

MR. KAPLAN: Yes, Defendants" Exhibit VV.

Q "In spite of the fact" --

THE COURT: It speaks for itself, doesn't it or do you want to use it as a predicate to some questions?

MR. KAPLAN: I would like to use it as a predicate.

THE COURT: ery well.

Q "In spite of the fact that the weight of informed medical opinion seems to indicate that safety and durability are not problems with the Soflens, we think that it is important for investors to recognize the potential negative impact of such publicity on consumer and professional demand for Soflens in the short-term. This article follows another rather negative article onthe Canadian Government's concern about the safety of soft contact lenses being marketed there. Such extensive publicity given to the questions of bacterial contamination, infection and fragility could slow the acceptance of Soflens."

You said that, sir?

A Yes, sir.

Q Now, sir, when Mr. Schuman said that Soflens sales had flattened on March 16, that was a conclusion you had already drawn by January 17, isn't it?

A No, sir.

Q You had concluded that they slowed, is that right?

A No, sir.

Q You had not concluded that they --

MR. GREENSPOON: This is arguing with the witness now.

THE COURT: Yes, sustained.

Next question.

Q Your comment about a press release to Mr. Schuman, Mr. Burkhead, could have come after Mr. Schuman called Mr. Dorfman, is that right?

A Yes, sir.

MR. RUSCH: I object to that as conjecture.

THE COURT: Let us find out if it did.

EXAMINATION

BY THE COURT:

Q You were in Mr. Schuman's office from 2.15 on, is that correct?

A Yes, sir.

Q You heard him make several telephone calls?

A Yes, sir.

Q To whom?

A There were two calls to Mr. MacCallum. There was a call to Mr. Dorfman. There was a call I believe to Mr. Einhorn of First Manhattan.

I should say I don't know at this point, I am not really sure in some cases whether the call came in to Mr. Schuman or calls went out.

Q But he spoke to different people, at least in the words he uttered?

A Yes, sir.

Q Let me just stop you there because you have covered the calls that we are primarily interested in.

Did you make your suggestion regarding putting out a press release, if you recall, before or after the conversation between Mr. Schuman and Mr. Dorfman?

A I don't recall, sir.

BY MR. KAPLAN:

Q In fact, sir, the events of that after-

noon are pretty well jumbled together in your mind, are they not?

MR. GREENSPOON: Objection.

THE COURT: Sustained as to form.

Let me put a question if I may, Mr. Kaplan.

BY THE COURT:

Q A lot of things happened in Mr. Schuman's office during that visit on that day, is that correct?

A Yes, sir.

Q Did you make any notes as they were happening?

A Yes, sir.

Q Do you have those notes now?

A Yes, sir.

Q Do you have them here?

A Yes, sir.

MR. KAPLAN: Perhaps we can short-cut this.

BY MR. KAPLAN:

Q This Dorfman call is not reflected on your notes of that afternoon, is it, sir?

MR. GREENSPOON: I object to this, your Honor, because he hasn't got the notes in front of him.

THE COURT: If he knows I will let him answer.

A I don't believe there is a specific reference in those notes to the Dorfman call, sir.

Q Those notes do not contain any reference to your having told Mr. Schuman to issue a press release, do they?

A No, sir.

Q Mr. Burkead, at the time you made the suggestion about the press release had you and Mr. Schuman discussed aphakics or the minikits or the flattening of the consumer sales?

A Well, as I suggested or mentioned earlier, as best I recall it all of the factors that I referred to earlier were ones that prompted the suggestion of contacting a public relations firm and considering a release.

Q Mr. Burkhead, wasn't it the earnings estimate alone that prompted that comment?

A The earnings estimate for the first quarter was the major factor prompting the comment.

Q Wasn't it the only factor, sir?

A I said to you earlier that to the best

of my recollection all of those factors were part of my decision.

Q Did you testify before the SEC on April 17, 1972?

A Yes, sir.

Q Do you recall telling the SEC at that time that you had told Schuman to issue a press release on the first quarter earnings?

A I recall having said words to that effect.

MR. RUSCH: There may be some confusion. Did you say the SEC testimony?

MR. KAPLAN: Yes, I did, sir.

Q You were examinined before trial in an action entitled Hawk Industries against Bausch & Lomb in which you were a defendant, sir -- Smith Barney was a defendant?

A Yes, sir.

Q Do you recall giving this testimony on that occasion, page 102, line 11:

"Q You don't? I think you testified before that you suggested to Mr. Schuman that he should issue a press release referring to the new earnings estimate. You did that at

the March 16 meeting, is that correct?

"A I think I suggested to Mr. Schuman that he contact his public relations counsel and he should consider issuing a release in that connection."

Did you give that testimony on that occasion?

A Yes, sir.

Q Was that true?

A Yes, sir.

MR. GREENSPOON: Your Honor, I don't see that this serves as any impeachment because he stated on the stand here that he made the recommendation and that the earnings estimate was --

THE COURT: I heard what he said. I will let it stand. I might have my own view but I think counsel is entitled to his.

MR. GREENSPOON: Thank you, sir.

MR. LIMAN: It is a matter of what he told Mr. Schuman anyway. What he thought is not --

THE COURT: What is in his mind is not pertinent here but I gather that in any event -- let's go back and just find out what you said to him in words or in substance, this business of

contacting a public relations firm and considering a press release.

What did you say to him in your own words, the best you can recall?

THE WITNESS: Sir, I said to him in essence I thought he should consider contacting his public relations firm and making a release.

MR. KAPLAN: May I proceed, your Honor?

BY MR. KAPLAN:

Q Mr. Burkhead, you attended a Soflens symposium held in San Francisco in May or June 1971, correct?

A Yes, sir.

Q Did you attend other Soflens symposia?

A Yes, sir.

Q Did you attend one in Chicago?

A Yes, sir.

Q And one in New York?

A Yes, sir.

Q You knew that those symposia were for practitioners only, correct?

MR. RUSCH: I object to that, your Honor.

THE COURT: I will allow it.

Q Isn't it true, Mr. Burkhead?

MR. RUSCH: How would he know?

THE COURT: If he knows.

These symposia you attended were in some way restricted to practitioners only?

THE WITNESS: I don't recall, sir.

Q Isn't it a fact, Mr. Burkhead --

THE WITNESS: The symposia were designed for practitioners.

Q Isn't it a fact that when you went to the symposium in San Francisco you paid $25 admission fee?

A Yes, sir.

Q Isn't it a fact that at that time that you did so you represented that you were a Dr. Shaw?

A Yes, sir.

Q And Mr. Burkhead, you related that you were Dr. Shaw because you knew those meetings were closed to anyone but practitioners, isn't that true?

A Yes, sir. However --

Q That is fine, Mr. Burkhead.

MR. GREENSPOON: I think he should be entitled to finish his answer, your Honor.

THE COURT: If you have not completed your answer I will permit you to do so. I don't

think much more need be said but if the Commission wants to hear it I will let them hear it.

A However, I did attend the Chicago --

THE COURT: Talking about San Francisco when you paid $25 and said you were Dr. Shaw. Is that the fact?

THE WITNESS: Yes, sir.

THE COURT: Very well.

Q Now, sir, Smith Barney is not only a brokerage house but has an investment banking division, true?

A Yes, sir.

Q In 1972 you were vice-president of Smith Barney I think you said?

A Yes, sir.

Q You were also a shareholder, were you not?

A Yes, sir.

Q And the share ownership at that time at Smith Barney was restricted to employees?

A Yes, sir.

Q Some time in the first six months of 1971, Mr. Burkhead, you learned that Bausch & Lomb was considering a financing, true?

A Will you repeat the question, please?

(Question read.)

A Yes, sir.

Q You met with Mr. Schuman and with a Mr. Dugan of the Smith Barney investment division in April 1971 with respect to the proposed financing?

A I believe the meeting was in July of 1971.

Q You met with Mr. Dugan and Mr. Schuman about the proposed financing, true?

A Yes, sir.

Q And Smith Barney submitted a proposal to Bausch & Lomb for it to be the investment banker on this financing?

A Yes, sir.

Q The financing was of the order of more than $20 million, was it not?

A I believe it was on the order of $20 million.

MR. GREENSPOON: I don't know where this line of inquiry is leading, your Honor.

THE COURT: Yes, it does not seem to be covered on the direct examination.

MR. KAPLAN: It is impeachment.

THE COURT: All right, you have used the magic word and I accept your representation.

Q If the proposal Smith Barney submitted would have been accepted it would have involved the payment of commission to Smith Barney on the financing?

A Yes, sir.

Q And what was the order of magnitude of that commission, Mr. Burkhead?

MR. GREENSPOON: If you know.

A I do not know. Our policy on the payment of commission for financing for those who bring the financing to the attention of the firm are up to 10 per cent of the net profit of the firm on the first financing.

MR. KAPLAN: Will you read that answer, please?

(Answer read.)

Q Mr. Burkhead, there came a time in late 1971 when Mr. Schuman informed you that Smith Barney's proposal was rejected and that Goldman Sachs were going to be investment bankers, true?

A Yes, sir.

MR. KAPLAN: No further questions.

MR. GREENSPOON: I move that all of that be stricken. There isn't impeachment in any of that testimony and it means nothing.

THE COURT: I will let it stand.

The application is denied.

BY MR. SMITH:

Q Mr. Burkhead, I believe you testified you followed Bausch & Lomb since as early as 1971, is that correct?

A Yes, sir.

Q You had had more than one contact with the company between the time you started following Bausch & Lomb through March 16, is that correct?

A Yes, sir.

Q During the course of those contacts had anyone at the company ever given you an earnings ~~statement~~ for Bausch & Lomb earnings?

A No, sir.

Q Had anyone ever given you an earnings ~~statement~~ on the Soflens earnings?

A No, sir.

Q Anyone ever tell you what the Soflens sales were to be?

A No, sir.

Q During the first quarter of 1971 you were following the stock very closely, is that correct?

THE COURT: Is that 1971?

Q 1972, I am sorry.

Following it closely?

A Yes, sir.

Q Do you recall what the high price of the stock was?

A I don't recall precisely. It was somewhere between 190 and 200 on the stock that was outstanding at that time.

Q That was in late January, was that?

A I don't recall the specific date, sir.

Q From that point the price of the stock began to drop?

A I believe I would appreciate your restating the question.

Q Whether from the point it reached 190 or as you indicated between 190 and 200, the price of the stock began to drop?

A The stock did decline from its high.

Q Also during the first quarter were you reading the Wall Street Journal on a daily basis?

A Yes, sir.

Q Did you read newspaper articles during that period about contact lenses, soft contact lenses?

A Yes, sir.

Q Did those newspaper articles talk about the possibility of contamination?

A Yes, sir.

Q Were there several of those articles, more than one?

A Yes, there was more than one.

Q Did those newspaper articles raise a concern in your mind that they would affect the sales of Bausch & Lomb Soflens, its product?

A Yes. As stated in my January 17 memo and in other memoranda, I was concerned that this recurring negative publicity could affect the sales of the Soflens.

Q Also during this period did you have contact with eye care professionals?

A Yes, sir.

Q Did you have contact with more than 10 of them?

A This is during the first quarter of 1972?

Q Or approximately at that time?

A I would say it would be on that order of magnitude during this period of time.

Q Had you either at this time or just before that endeavored to make your own survey of eye care professionals and and their reactions to the Soflens?

A Yes, sir.

Q Soft contact lenses?

A Yes, sir.

Q You continued your contacts with these people, these eye care professionals?

A Yes, with several of them.

Q Your purpose was to get a feel from them as to what they were doing with the product?

A Yes, sir.

Q Any concerns they had about it?

I believe you testified you talked to Mr. Harby on February 24 I believe it was about Bausch & Lomb, is that correct?

A Yes, sir.

Q After you had that conversation did you issue a report that recommended the purchase of Bausch & Lomb stock?

A Yes, sir.

Q Between February 24 and February 29 did you decide to change your recommendation from purchase to a hold?

A Yes, sir.

Q Between February 24 and February 29 did you contact some of your eye care professionals that you had been dealing with?

A Yes, sir.

Q In particular did you contact a fellow, Dr. Klahr?

A I believe that is correct, yes, I believe I did.

Q Did you talk to him about consumer reports, a proposed article about Bausch & Lomb Soflens?

MR. RUSCH: May I have that question read?

THE COURT: Yes, Mr. Reporter, read the question.

(Question read.)

MR. RUSH: I don't believe the question is quite clear, your Honor.

THE COURT: If the witness understands it I will let him answer it. If he doesn't he will

say so and it will be rephrased.

A I understand it. I am not fully sure that during that period of time I talked with him about the Consumer Union article. I did talk with him at some point about the Consumer Union article and I believe In that time frame.

Q That article I believe ended up with or did that article recommend a wait and see attitude with respect to the Bausch & Lomb Soflens?

THE COURT: Doesn't the article speak for itself?

MR. SMITH: It does but it is not an exhibit here and I would just like --

THE COURT: The best evidence but I will let him answer anyway.

The article is the best evidence. I will let the testimony in anyway.

A I do not recall specifically. In general terms I believe that is correct.

Q Now, through late February did the price of Bausch & Lomb stock on the New York Stock Exchange continue to decline?

A Yes, it was declining in the latter part of February.

BY MR. SMITH:

Q Do you know whether or not it continued to decline in early March, prior to March 16th?

A Yes, sir, I believe it did.

Q Now, up until February 29th, with the price declining as it was and with your outstanding recommendation to the customers of your firm that they buy Bausch & Lomb stock, did that create a certain amount of pressure on you and on your firm?

MR. RUSCH: I object to the form.

MR. GREENSPOON: Objection, your Honor.

THE COURT: Sustained.

Q Did you issue more than 10 reports on Bausch & Lomb between the time you first started following it, in early 1971, and March of 1972?

A I don't remember the specific number, but I would say that it was on the order of 10, maybe slightly more.

Q Was it more reports than you had issued on any other company you were following?

A Yes, sir, I believe it was.

Q Do you recall whether or not more than half of those reports were in response to Wall Street Journal articles or newspaper articles talking

about contamination or other problems with the lens?

MR. GREENSPOON: Objection, sir. He will have to be more specific.

THE COURT: Sustained.

Q Do you recall whether or not any of those reports were your comments following Wall Street Journal articles about Bausch & Lomb soft contact lenses?

A Yes, sir, some of them were.

Q You have talked earlier today about aphakics, and I take it aphakics are the lenses to be used for post-cataract operation patients. Did you have any estimate of the number of such lenses that would be sold in the first quarter of 1972 at any time?

A I did not have a specific number that I recall on the aphakics.

Q Did you ever receive any specific number or any other number from the company as to how many aphakic lenses they expected to sell in the first quarter or any other time?

MR. RUSCH: I object to the form of that question.

THE COURT: I think his answer will be coming through and it will make it academic, so

I am going to let him answer.

A Does this include March 16th?

THE COURT: Up to March 16th.

Q That's right.

A No, sir.

THE COURT: I will let it stand.

Q At that time you didn't change your estimates for the earnings of Bausch & Lomb during the 1972 year, is that correct?

A That is correct, sir.

Q Was the basis of your change in the recommendation your estimate of investor psychology, a change in the investor psychology with respect to Bausch & Lomb stock?

MR. RUSCH: I object to the form of that question.

THE COURT: Sustained.

Q What was the basis for your change, if you did change your earnings estimate, your change in position as to whether or not to buy or change to a hold?

MR. RUSCH: I object to the form of that question, your Honor.

THE COURT: I will let him answer it, if

he can.

What was the basis for the withdrawal of your buy recommendation on February 29th?

THE WITNESS: Sir, I was principally concerned with investor attitudes toward Bausch & Lomb stock in the light of the continuing or recurring negative publicity that had been raised with regard to the safety and durability of the lens, the possibility that the FDA might impose some restrictions on their marketing of the lens or require additional testing, and the possibility of competition.

MR. SMITH: I have no further questions, your Honor.

MR. GREENSPOON: One moment, your Honor.

MR. RUSCH: May we have a moment, your Honor?

THE COURT: Yes.

(Pause.)

REDIRECT EXAMINATION

BY MR. RUSCH:

Q I direct your attention to Defendants' Exhibit BBBB, which is an article from the Wall

Street Journal that appeared on or about March 2, 1972. Would you read that article, glance at that article?

(Pause.)

I want to direct your attention in particular to the paragraph reading, "As a result, the company disclosed yesterday the heldup shipments while its entire inventory was resterilized. The company said production wasn't affected and that shipments will resume today."

Do you recall at or about that time reading that Wall STreet Journal article?

A Yes, sir.

Q And did you have any information subsequent to March 2nd but prior to March 16th, 1972 that shipments had not resumed the succeeding day, namely on or about March 3, 1972?

A No, sir.

MR. RUSCH: No further questions, your Honor.

RECROSS EXAMINATION

BY MR. KAPLAN:

Q Mr. Burkhead, did you have any information one way or another as to whether shipments had

resumed after March 2nd?

A No, sir.

MR. GREENSPOON: As of what time?

Q Between March 2nd and March 16th?

A No, sir.

MR. KAPLAN: No further questions.

MR. SMITH: No further questions.

MR. RUSCH: Your Honor, the Commission has no further questions.

THE COURT: You may step down. Thank you, sir.

(Witness excused.)

MR. GREENSPOON: Your Honor, at this time the Commission has no further live witnesses. We would like at this time to introduce into evidence the transcripts and depositions, those that I had stated earlier in this case, to which there had been some objections filed by the defendants.

With the defendants' concurrence, we would prefer, if we could, to submit them to you together with their objections and your Honor could decide the objections without argument from either side.

Secondly, your Honor, I should like

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interest.

I submit, your Honor, that protection of the public interest cannot be allowed to hang on such slender threads. In fact we know--

THE COURT: How many companies does the Commission know of which have written procedures at the present time in this regard?

MR. GREENSPOON: I am unable to answer that question, sir, except to point to the Lum's case in which Judge Tyler, and I was going to come to that in a moment, in which Judge Tyler ordered --

MR. SMITH: That was a brokerage house.

MR. GREENSPOON: Lum's and Cesars World were not brokerage houses.

THE COURT: I didn't mean to interrupt you.

Please proceed.

MR. GREENSPOON: We know that company executives come and go. We know from the testimony here that Mr. Stillman who was financial vice-president at the time, we know that he succeeded to Mr. Schuman's job. He is no longer with the company. Mr. Schuman, of course, candidly admitted that there are always changes in the executives in the

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company, in any company. Yet, the company insists that this verbal transmission is going to be offered to do the trick.

We have seen firsthand right in the courtroom confusion that can happen with words and we have also seen that memories grow dim, people don't recollect and yet there are a number of exhibits here and others that have been read into evidence pursuant to the Federal Rules of Evidence, to show that memoranda and notes made at the time of the conversations are certainly the very best thing that one could look to in order to see what one has meant and what someone should be doing or how to do it in the future.

The protection of the public, and I submit that this is the Congressional charge to the Commission, it is our mandate, it demands there be more than oral arrangements. As I referred to a moment ago --

THE COURT: Then I think the Commission ought to promulgate rules and regulations and absent that I don't see the Court promulgating them on an ad hoc basis. That is my comment to that.

MR. GREENSPOON: Your Honor, if I may

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respond, the ad hoc basis is the basis which has been used.

THE COURT: You come here to seek an extraordinary remedy from this Court, and injunction. And I think injunctions, since they are extraordinary remedies, should be issued when they are needed in extraordinary situations and should not be utilized generally in lieu of administrative regulations.

Congress has given the Commission considerable in the way of rule making authority and I suggest that this is a subject to which the Commission has addressed itself in the past, is undoubtedly presently addressing itself and will undoubtedly continue to do so.

I think that the remedy here is more likely to lie with an administrative regulation which could then provide guidelines than with the Court acting ad hoc. I suggest Courts should act only to prevent likely future violation and I think you would agree with me that I would have to determine here whether or not there is a likelihood of a future violation.

You made the point before that the past violations to which you refer, and I am inclined to

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agree with you that there was at least one past violation here.

You say they permit the inference of the likelihood of future violation. I would mention to you that the most recent past violation which I have been shown here occurred on March 16, 1972, a shade over four years ago.

I do not regard the activities of October 1973 as fitting into the same category. I see nothing between March 16, 1972 and today which leads me to believe that tomorrow, the day after tomorrow or later in this year or next we will have violations by the defendants in this case.

That is my tentative thinking. I will hear you further.

MR. GREENSPOON: With your comments in my mind, your Honor, and trying not to be intimidated by them --

THE COURT: Please don't, they were not meant to intimidate you. But I would be less than candid with counsel if I did not express my tentative views at this point.

MR. GREENSPOON: Your Honor has expressed